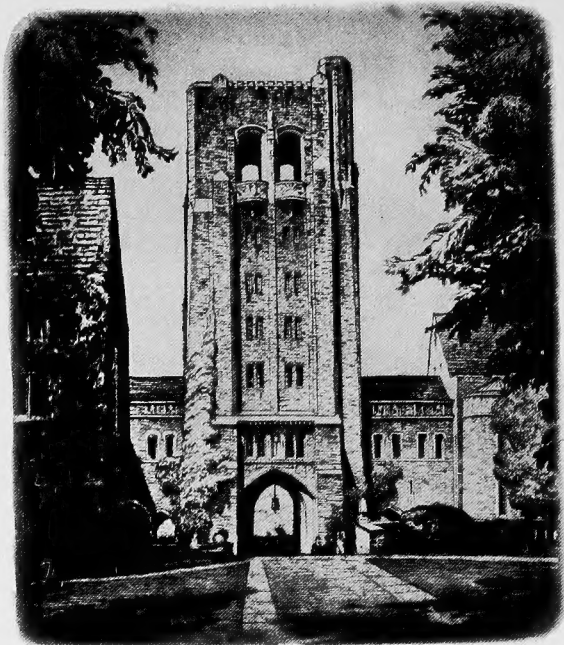


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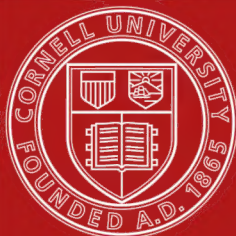
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THE CONSTITUTION

OF THE
UNITED STATES.

A CRITICAL DISCUSSION OF ITS GENESIS,
DEVELOPMENT, AND INTERPRETATION.

BY
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VOLUME I.

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THIS BOOK IS

DEDICATED TO THE MEMORY OF HIS FATHER,

JUDGE HENRY ST. GEORGE TUCKER,
MEMBER OF CONGRESS, CHANCELLOR, AUTHOR, PRESIDENT
OF THE COURT OF APPEALS OF VIRGINIA, PROFESSOR
OF LAW IN THE UNIVERSITY OF VIRGINIA.

UPON WHOSE TOMB AT WINCHESTER, VIRGINIA, THE HAND OF
FRIENDSHIP HAS INSCRIBED THESE WORDS:

IN MEMORY OF HENRY ST. GEORGE TUCKER,
PRESIDENT OF THE COURT OF APPEALS.

LEARNED WITHOUT PEDANTRY: GRAVE WITHOUT AUSTERITY: CHEERFUL
WITHOUT FRIVOLITY: GENTLE WITHOUT WEAKNESS: MEEK BUT UN-
BENDING: RIGID IN MORALS, YET INDULGENT TO ALL FAULTS
BUT HIS OWN. THE ELEMENTS OF GOODNESS WERE IN
HIM COMBINED AND HARMONIZED IN A CERTAIN MAJESTIC
PLAINNESS OF SENSE AND HONOR, WHICH OFFENDED NO MAN'S SELF-
LOVE, AND COMMANDED THE RESPECT, CONFIDENCE AND AFFECTION OF ALL.

A FAITHFUL HUSBAND: A KIND AND PRU-
DENT FATHER: A GENTLE MASTER: A STEADFAST FRIEND.
AN ABLE AND DILIGENT PUBLIC OFFICER.

*He lived without reproach
And died without an enemy.*

PREFACE.

John Randolph Tucker was born at Winchester, Virginia, on the 24th of December, 1823, and died at Lexington, Virginia, on the 13th of February, 1897. He was the son of Henry St. George Tucker, President of the Court of Appeals of Virginia, and grandson of St. George Tucker, also a member of that court, and who was the author of "Tucker's Blackstone," the first commentary on the Constitution of the United States. During a long and active professional career, the author served for eight years as Attorney-General of Virginia and for twelve years as a Representative in Congress, during four years of which service he was Chairman of the Judiciary Committee of the House. From early life a close student of the Constitution and of the constitutional history of the United States, he had long cherished a purpose to write a commentary on the Constitution. His eminent public career brought him into living contact with many great questions on which he had read and thought deeply; and on his retirement from Congress in 1887 he hoped to take up his long-meditated work. The exaction of professional labors, to which were added from the year 1889 the re-assumed duties of the Chair of Constitutional and International Law, and Equity in Washington and Lee University, delayed the beginning of systematic work until the autumn of 1895, and his death in February, 1897, has, unfortunately, devolved upon me the task of carrying through

the press the manuscript which he left. This I have cheerfully assumed, not only from a sense of filial duty, but in obedience to his wish expressed but a few weeks before his death.

The author never revised the manuscript, which was left as written out from the notes of the stenographer to whom it was dictated. The transmission of ideas through an amanuensis, and the translation of stenographic symbols into English, must necessarily, at times, be at the expense of accuracy of expression and style, and I cannot hope to have freed the original from errors necessarily incident to such a mode of composition. My purpose has been at all times to preserve the original just as it was expressed by the author, rather than to attempt to correct any supposed blemishes of style or occasional obscurities of expression, or to change any colloquialisms more fitted for the lecture-room or the hustings than for the dignified pages of refined commentaries, preferring to retain such rather than incur the danger, by change, of imparting to any passage a meaning different from that which was intended.

When the Constitution proper is reached, it is treated consecutively, section by section, beginning with the Preamble and concluding with the Amendments; and wherever constructions at variance with those advanced by the author have been given to any clause by authors or judges, the views of such authors and the opinions of the judges bearing upon the decision are often given at length.

Clause 1 of section 4, article I, of the Constitution, the Fifteenth Amendment, and the second, third, fourth and fifth sections of the Fourteenth Amendment, are not treated in these pages, as the end came before they were reached.

The idea of supplying these omissions has naturally occurred to me, and I have not been free from doubt as to the propriety of publishing a work which was incomplete in these particulars. My doubts, however, have been resolved in favor of publishing the manuscript as I received it, for the reason that the omitted sections, in the minds of many, would not be considered of much practical value, in view of the adjudications of the courts; and especially for the reason that I felt that to supply them by the hand of any one other than the author, however well or however conformably to his well-known views such work might be done, would surely tend to weaken the force of the book.

Many valuable suggestions, in the course of the preparation of the work, have been freely given me by President Wm. L. Wilson, and I have been relieved of the burden of the preparation of the table of cases by Mr. E. Morgan Pendleton, of Lexington, Virginia, and have been the recipient of other valuable aid from him. To Mr. H. Parker Willis, my colleague in the Faculty of Washington and Lee University, my obligations are chiefly due for his intelligent suggestions and untiring labors, so freely given, embracing the entire preparation of the work, including the Index—the latter being entirely the work of his hands.

I cannot hope that this work which is now given to the public will be free from criticism, or that the position of the author on all subjects discussed will be accepted without dissent. The book is an expression of the views of the author, not merely his intellectual opinions, but his deep convictions, in the consistent exercise of which he lived and in the faith of which he died; and neither the dissent of friendship, nor the storm of popular indignation, nor yet the hope

of political preferment, ever shook his unswerving devotion to them. He religiously believed that the maintenance of these principles was necessary to the stability and preservation of the Union and the happiness and prosperity of the people, and that their rejection would as certainly result in tyranny, despotism and ultimate dissolution.

H. ST. GEORGE TUCKER.

WASHINGTON AND LEE UNIVERSITY,

LEXINGTON, VA., April, 1899.

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CONSTITUTIONAL LAW.

CHAPTER I.

INTRODUCTION.

§ 1. Political Science should be based upon principles established by the use of the Inductive Method. When speculative theories yield to facts, this science will become philosophic, and will have practical value. It is a practical science and not a theory. The relations involved are infinite, and the social machinery needed for their regulation is too intricate to be constructed upon any other foundation than experience.

§ 2. Politics or the Science of the State, deriving its name from πόλις (city), or πολιτεία (constitutional government of a state),¹ which has its root in πολός, the many, is the Philosophy of the Corporate Unity of the many, bound together in society. This incorporate being, *e pluribus unum*, we call the State, the Commonwealth, the Nation, the Body-politic.

The same root is probably found in the Roman *populus*, perhaps in the *Res publica*. There is also another word, *civitas*, which is more restricted, importing the whole body of citizens, and is in contrast with Aristotle's πλήθος πολιτῶν, or mass of citizens governing the State; involving a distinction hereafter to be noticed specially.

Cicero defines *populus* thus: "*Populus autem non omnis hominum coetus, quoque modo conjugatus, sed coetus multitudinis juris consensu et utilitatis communione sociatus.*"²

It is not an aggregation casually brought about, but a *coetus*, a going together of the many; *sociatus*, companioned

¹ Aristotle's Politics, B. 3, ch. 1.

² De. Rep., Lib. I, 25.

and allied; *juris consensu*, by the sanction of law; and *utilitatis communione*, with a community of benefit, making thus a common-weal, or *Res-publica*.

This definition is valuable, while not in accord fully with modern thought. It defines the civil body politic, a generic term, which best describes that which is often called State (*Stare*) from its territoriality as distinct from a nomadic body; — or nation (*nascor-natus*), because evolved from the family nucleus; or a common-wealth because constructed for the common weal. It is a political body of citizens united for one social life; not the *πλήθος πολιτῶν* of Aristotle, which meant only the mass of voters in the state — but the whole body of citizens organized into a state.¹

§ 3. And let it be noted here that the Body-politic is not the Government, nor the persons admitted to participate in the functions of Government — but it is the whole body of persons politically associated. The organic force of the Body-politic, that social power which controls persons and things, for peace, order and the common weal, is what we call Government. The expression of that force is Law.

This distinction between the Body-politic and the government is fundamental and essential; especially in America, where it has been asserted and maintained with peculiar emphasis, though germinally it may be traced in older institutions.

§ 4. A Body-politic may then be defined to be the organism in unity of the many human beings, associated by jural bond for the objects of the social state in which is *vested* all *rightful* political power over its members for the common good of all. This rightful political power so vested, we call *Sovereignty*, or *Supremacy* over men and things. In this definition there are two qualifying words as to the political power of the Body-politic: *vested* and *rightful*. The one indicates the derivation, the other the limitation, of this supremacy or sovereignty.

These two words introduce us to the discussion of man's

¹ Aristotle's Politics, B. 3, ch. 6.

relation to the Body-politic, which is rather a branch of Sociology, but is properly preliminary to the consideration of the relation between the Body-politic and the government, which belongs to the science of Constitutional Law. Both questions are embraced in Political Science, and the latter question cannot be understood until the first is fully comprehended.

§ 5. The only religious creed which will be assumed as true in this discussion will be that there is a God, who is the Creator and the Governor of the Universe. The principles established, while they will accord with the Christian system, are not deduced from it as an hypothesis, but will result from independent reasoning.

§ 6. What is the proper relation of the Individual to the Body-politic? This is the primal question in our inductive process as applied to Political Science. A condensed answer to this question will be attempted, without going into details, and without much reference to the dissentations of authors.

Many writers, abroad and in America, have held the theory of the Social Compact between men as the basis of Society, and as the fundamental postulate of all political philosophy. This theory is fiction, and as an hypothesis is unsound, and must lead to error.

Of such compact history makes no record; and none could have existed. Man-right in Society is not derived from, nor secured by, any contract between men. Such contracts of men already in social union have been formed, and constitutions and governments have been established by *quasi* agreements, after Society had long existed; but men have never, when out of Society, entered into it by any compact or agreement. Upon the institutions of Society, as *un fait accompli*, men have engrafted a formal constitution for the Body-politic, which by consent express, or implied from acquiescence, has been recognized as based on their consent: but institutions historically have always preceded constitutions. The theory predicates an independent isolation of men, and then

assumes an exodus from isolation into social union upon the terms of a compact, by which the Body-politic is created, and its authority is made legitimate.

This theory was the revolt of liberty against the claims of the advocates of despotism, and sought to justify the subversion of established systems of government by the hypothesis of a compact originally made, of which, when broken on the one part, the repudiation by the other was justified. This motive, however it may excuse the fallacy, cannot justify us in adhering to it, especially when, as will be shown, it may be displaced by a more effective doctrine in behalf of free institutions, based upon undoubted and historic foundations.

§ 7. If we suppose the race began with a single pair,¹ man and woman, they were bound in social relations by *quasi* consent, and this pair constituted the dual-unit of humanity. Their union is the ordination by God, and the impulse of natural instincts.² Every man (except this primal pair) entered society by birth, not under contract. He came without his own volition, by the will of his parents, and under the order of nature. At his coming, he is without will, incapable of contracting, weak and the most helpless offspring in the animal kingdom.

A canon of this School of thought, and perversion of that embodied by Mason in the Bill of Rights of Virginia, June 12, 1776, and by Jefferson in the Declaration of Independence, July 4, 1776, is thus formulated: "All men are born free and equal."

This is utterly untrue—in form and substance. The human being is born not in manhood, but in feeble infancy. He is not free, when born, but subject to a power he cannot resist or abridge; and freed from which, he would perish. Nature ushers him into life under this imperative condition, and assigns him to this subjection, as essential to his life and well-being. To him, this despotism is a blessing, and freedom would be a curse.

¹ Humboldt, *Cosmos*, 365, etc.

² Aristotle's *Politics*, B. I, ch. 2;
Aristotle's *Economics*, B. I, chs. 2, 3.

He comes not isolate, but into a social state, to which he did not consent, constituted by others, and from which he cannot fly. Pillowed on a mother's heart, and protected by a father's thrift and courage, he is born at once the subject of their authority, and the dependent object of their care. The want of a social compact is well supplied in the provision of Nature for him;—for under parental control, he is secured from parental tyranny by the instinct of parental love. He is safe in infancy, and under the nurture which God provides, he expands into matured manhood.

§ 8. The canon above quoted asserts that men are born not only free, but equal. Equal to what? and in what? In physical, mental and moral nature? At birth he is equal in neither to any adult, nor to other infants in either of these. Infants are notoriously unequal in heredity and environment.

Inequality continues at the maturity of manhood. The sexes are diverse in gifts and functions. Races of men differ widely.¹ Men of the same race are unequal. In physique, we have giants and dwarfs — athletes and cripples — a Hercules and a hunchback: in mind, we have a Napoleon and a Louis — a Newton and an idiot: in morals, a Washington and an Arnold — a La Fayette and a Marat. In music, we find a genius for harmony, and another who cannot distinguish one air from another: and so in poetry, art, science, philosophy and statesmanship.

God, in derision of the human dogma, stamped the law of inequality upon all his works. There is likeness, but no sameness. *Nullum simile est idem*. Infinite wisdom is manifest in the infinite variety of creation. Organic and inorganic kingdoms have, in each, innumerable genera and species. Vegetable and animal organisms present a mass of beings in the innumerable steps of an ascending scale from the sponge to the highest type of man. It is in this plan of the all-wise God that we find spheres of utility adapted to the several capacities of every organic atom and

¹ Bluntschli, Theory of the State, Bk. I, ch. 1.

every organic life. Each has its function; to each is assigned its mission; and to all moral beings, their duty. Inequality in such a plan is essential, and is the fundamental law of the system. Equality would be out of place, because if established it would destroy the system.

Out of this infinitude of diverse creatures, diverse in structure, in functions and endowments, springs that law of human activity, denoted by the economist as "the division of labor," which is only practicable where there are laborers unequal in capacities, and which makes, under the laws of production and exchange, each creature participate in the productive qualities of every other, and, by combining the labor of all, contribute to the happiness and the common good of all mankind.¹

§ 9. In the Virginia Bill of Rights adopted June 12, 1776, drawn by George Mason, the dogma referred to is presented in a form less open to criticism. It declares² "that all men are by nature equally free and independent." This statement is made of "men;" and asserts their equality by nature in freedom and independence, without averring the extent of their freedom or independence, or of any equality except in freedom and independence. In this form, it is not very different from the doctrine we shall state hereafter.

In the Declaration of Independence the statement is, "that all men are created equal; that they are endowed by their Creator with certain inalienable rights," etc. This avers a creation by God of men in a relation of equality, but without averring in what the equality consists except as it may be implied in the endowment of each with inalienable rights, which are then designated to be: "life, liberty and the pursuit of happiness." Taking this whole statement, it will be found to be very much in accord with the views now to be presented.

§ 10. Pursuing our induction, the question arises: What freedom, if any, and what equality, if any, may properly be

¹ See this illustrated in Rep. of Plato, B. 2, ch. II. ² Bill of Rights, Art. I.

asserted for men? Is all freedom and equality desired? Let our induction winnow the truth from the error.

§ 11. The germ of manhood enters by birth into the family (which is the germ of all society), in subjection to the father, the *patria potestas* (the germ of all government); and all this is by Divine ordination.

The whole economy of this entrance upon life is conclusive evidence of the truth, that the parental government was designated for the good of the child; for his nurture under the best conditions to his maturity. He is placed under a power, upon which the Divinely implanted instinct puts the most potent limitation, that it shall be exercised in justice and love for the highest interest of its subject. It is not autocratic, it is Divinely derived—it is not absolute, but vested in trust for the protection and development of the infant. The Divine injunction to the parent is to keep this child, and foster in him the gifts which God has bestowed upon him: the very fact that power and love are linked in this primal government of the family chief, proves that the Divine institution of Government in its germinal form was limited and confined by the paramount duty to the child, the performance of which was insured by the tender relation between parent and child. The power was entrusted to love, in order to secure the well-being of the child.

While therefore we find in the family the evidence of the fundamental truth, that “the powers that be are ordained of God,”¹ we find the qualification of this ordination, “for he is the minister of God to thee for good.”² The first shows that power in government lies in grant, and is not autocratic; and the second, that it is invested, not for the benefit of the ruler, but for the good of the subject.

This is the constitution for the family government, written upon the living table of the parental heart.

§ 12. The subject of this family government is a helpless human being, a creature of God, gifted with faculties, which are his own exclusively, to which a duty is annexed in their

¹ Romans, ch. 13, 1.

² Romans, ch. 13, 4.

use, with responsibility therefor to the Giver of them—a responsibility personal and exclusive. He holds his endowments by exclusive title in trust for God. In order to perform this trust duty, his use and direction of his powers must be by his own will, because of this sole and exclusive responsibility. This is the dogma of self-consciousness, as well as of Divine authority; for with the gift of talents to each, the injunction follows: “Occupy till I come.” The endowments are not equal, but diverse; but the duty of each, the trust imposed upon, and the responsibility exacted from, each, are equal and exclusive. The right of each to self-use, for the discharge of his trust and to meet his responsibility, must therefore be exclusive, because the trust and the responsibility are personal and independent. The gifts are unequal in amount, but the right of each to his several endowments is equal to that of every other being, because each holds his right under equal and exclusive trust and responsibility to his Creator.

Lord Bacon and his menial servant were wholly unequal in their respective endowments. But the right of each to his own life, limb and liberty was equal to that of the other. The objects of rights may be unequal, but the right of each to those several objects must be perfectly equal. The cottage of the poor is not equal to the mansion of the rich; but the title to the hovel home is as impregnable as to the princely palace.

§ 13. Herein we find the true equality between men. It is the sole, exclusive and personal right of each man to the endowments each receives from his Maker. *Inter homines*, each man’s title to these is absolute; between himself and God, he holds as trustee for his Creator. Every man for himself in absolute self-use against all intrusive control by any other man. “Who art thou, that judgest another man’s servant? to his own master he standeth or falleth.”¹ How can any man interfere with the exclusive right of another to do his personal duty and meet his sole and exclusive responsi-

¹ Romans, ch. XIV, 4

bility to the Divine Being? How can we lawfully control another in discharging his duty to God? In the attempt, he invades the sacred precincts of the Divine Government. No man can allow another to do so and be guiltless; for it would be treason to his trust, and destruction of his duty. He must resist this attempt, because only in freedom of action can he fulfill his Divinely appointed mission. His defense of this personal liberty, therefore, is a religious duty to God. It is not a mere right he may waive, but an imperative duty he *must* perform.

When this personal trust in self-use to the Divine Being is fully apprehended, it will embrace all human action, whether called secular or religious. All self-use will be regarded as religious duty. The liberty of self-use, or, in other words, the liberty of our life, will be seen to be a Divine gift to each man with which to do a Divinely imposed duty, under accountability to the Divine King. To surrender this gift of liberty, is religious treason; to defend it, religious duty.

§ 14. Liberty, which comprehensively means this exclusive right of each man to self-use—that is, the exclusive use of the Divine gifts to him, under trust and responsibility to God, does not come, therefore, through any social compact of men, or as a gift from society or from government. It is the gift of God! It is a liberty of self-use, inalienable by himself, because that would be breach of duty and surrender of the trust Divinely vested; and inalienable by any and all others, because a sacrilegious robbery of that with which he is Divinely invested.¹ Voluntary surrender is personal treason to this trust, and to deprive him of it, is to rob God's right in him. Either is destruction of the sacred trust he holds for his Maker.

§ 15. We have thus seen that, by Divine ordination, the family is the germinal society into which is ushered, by Providential methods, the infant germ of manhood, as a subject of the germinal Body-politic, the parental chief of the

¹ The language of the Declaration of Independence is in accord with this view.

family. We have further seen that this parental government, Divinely ordained, has limits on its powers, in that they must be exerted for the good of the subject; and that this subject, as a creature of God, is endowed with the liberty of life, that is, with the exclusive right of self-use as to these endowments, in discharge of his personal duty and under his exclusive responsibility to God.

It is an obvious consequence of these propositions, that the powers delegated by the Creator to this primal government, not absolutely but in trust, are limited to such exercise of these powers as shall secure to the subject the full self-use of his endowments, for the purpose for which God bestowed them — i. e., to work out his destiny in discharge of his duty in order to meet his religious responsibility to his Creator. The powers so ordained of God were given for the use and benefit of the child — to save life, not to destroy it — to promote his health and happiness — his growth and full development to matured manhood. Society was thus made for him — as a school for his training; and the family government was constituted to secure his liberty and to advance his well-being; and as there might be many children in the family, the rightful exercise of its governmental powers would be in limiting them to such restraints on its members as would best conserve the right of each to his personal liberty of self-use, free from the intrusion of others, so that each may conform his life to the purposes for which it was given to him by his Maker. And it is a clear corollary from these principles, that the power ordained to protect each of its subjects in their liberty from invasion by others, cannot be so exercised by itself as to destroy or abridge that liberty. The protector cannot assail those he was ordained to protect, and cannot destroy the liberty he was created to secure. The Divine constitution for the personal government of the family was one which ordained the delegation of limited power to the parent, to be exercised in trust for the good of the child. In it we find the model for free institutions in all ages and for all mankind.

§ 16. In § 4, *ante*, we defined Sovereignty to be “the *rightful* political power *vested* in the Body-politic.” In what we have ascertained by our inductive method, we are prepared to see in the primal body-politic, the family, the meaning of these terms. For we have found that power in the family over the children is Divinely vested, and is not autocratic: — it is derived from God, and is not original. And we have further seen, it is only rightful when it is limited to the purpose of preserving the liberty of its members in the self-use of their respective faculties under their separate and exclusive responsible duty to God.

In this germ of society and of government, we find the organic social force restrained by Divine limitation to the exercise of only such powers as will conserve the personal liberty of its individual members, and promote their good. This is a cardinal canon of the Divine constitution of the family, the germinal society and the germinal government, ordained for men by their Creator.

Neither revelation nor reason conflicts with this canon; but both uphold it. Society and government were made for man: man was not made for them. Society was ordained as the school of our race; and government was ordained to preserve society. This Divine ordination of both for the use of man involves the negation of power in either to misuse or abuse his personal rights or his individual liberty. To do this would defeat the Divine purpose in the ordination of both. It would violate the right of God in man; and thus perpetuate a wrong, not only on man, but on his Creator.

Hence when the *patria potestas*, ordained of God for the family government, invested with authority limited by the right of man to his personal liberty of self-use (free from all external intrusion), with which the man is as distinctly invested by Divine ordination as the power itself transcends this limit and invades the domain of individual freedom, it usurps an authority never vested in it, and violates the rights, the protection of which was the only purpose for which it was created.

While therefore it is clear that the *patria potestas* is ordained of God, the ordained limits on its powers are as clear, growing out of the rights of its subjects, to conserve which is the trust purpose for which those powers were conferred. The fact of ordination of the powers that be must not be held to give Divine sanction to the claim of unlimited authority by those "powers," nor to save from condemnation the tyranny of despotic governments, which have destroyed the liberty of the individual man, which those "powers" were ordained to protect and secure.

The power of government is ordained of God, but so is the right of the man, and the "power" of the one is limited to the conservation of the other — in the primal constitution of society. This Revelation teaches, Reason sanctions and Consciousness confirms.

§ 17. It is equally illogical, and wholly contrary to reason, to infer that the patriarchal form of government which was evolved from that of the family, and all other systems of government which have grown from these, have any unlimited authority, or any power to destroy the individual liberty of their subjects. The limitations on the germinal form of government according to its original constitution, which have been indicated, follow governments in every form they may assume, and bind each and all of them to obedience to the fundamental canon already stated, to-wit: that no authority is rightful which does not conserve the personal liberty of the man and promote his individual good.

§ 18. These considerations suffice to show that, while the Body-politic is Divinely ordained to exercise power over men, yet the individual man is created by God with inalienable rights, for the security and conservation of which the Body-politic holds its powers in trust; and that these are vested not for the sole purpose of protecting the man in his self-use, but of securing to him the liberty of self-development, as well as the fruits of his self-use, embracing life, property and the pursuit of happiness.

In this view the language of Jefferson in the memorable

Declaration of Independence is essentially true: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."

The Body-politic is the means Divinely ordained to secure the inalienable rights of men, and is only legitimate when it promotes and is not destructive of these ends. This fixes the true relation between man and the Body-politic. It was made for his good; he was not made for its benefit. Magistrates are the trustees and servants of the people; and men can never be jurally deprived of their essential liberties by the power of government.¹ Political power and man-right stand related as trustee and beneficiary — not as master and subject. God delegated the power to govern, but he vested the right in the man. The right is primal and essential; the power is secondary and auxiliary. The right is the end; the power the means to secure it.

§ 19. It will be noted that, with some exceptions, writers on political science concede the existence of man as a creature of God. Rousseau speaks of the "binding obligations he lies under to himself."² We must regard the "binding obligations he lies under to" his God. This makes his self-preservation not only a self-obligation, but a religious duty. As a being endowed with distinct faculties and will, which are the essential of his personality, he must be sole determiner

¹ Va. Bill of Rights, Arts. 1, 2, 3; in other state charters and Constitution of United States.
 Preamble to Const. of Mass., 1780, Arts. V, VII. See like declarations

² Social Compact, Bk. I, ch. 5.

of his destiny. He cannot yield this power, charged with the supreme duty, without peril to himself and treason to God. It follows inevitably, that he cannot permit the Divinely constituted guardian of this essential liberty to destroy it. As the ward of the Divine Being he must use every means to prevent government from turning its power, entrusted for his shield, into a sword for his ruin.

§ 20. In this view, the Body-politic is man's trustee — not his master. Man is a *cestui que trust*, not a slave. His right is God-given. Its power is Divinely intrusted for the conservation of his right. All the theories of Hobbes and his utilitarian followers, which place his title to liberty in the will of the Body-politic, or by the grace of government (Hobbes' Leviathan), or of Rousseau and others, which deduce them from a real or hypothetical contract made for him by a dead ancestry or by himself, or implied from his acquiescence, are alike false and fatal to his interests. Deriving his title from God, his claim is higher than the power of all governments. His right precedes its power; and power is God-given to guard God-given right. Man is placed by God in wardship to the Body-politic as his guardian — and the guardian's power is legitimate only when it protects, and is *ultra vires* when it impairs the right of the man.

§ 21. This man-right is coupled with a trust for its use — a trust imposed on him by the Creator. When realized as such, not as a mere possession to use or not use, at the option of the holder, but to be used under the sanction of duty to the Divine Giver, it becomes an impulse to real life, that is, to self-development, to the highest possible degree. Self-direction under dictates of self-conscience is thus an imperative duty — and the enlightened human soul will be scrupulously intent on the exclusion of all external interference with performance of this truly religious duty; for all life, in this view, is strictly religious, — that is, under responsible obligation to God. And in this consideration will be seen the powerful influence of Christianity upon free institutions.

Before the Christian era, all polity was concentrated upon the construction of the State — without special regard to the right of man. The utility of the ancient systems was in the glory of the commonwealth, which conferred its gifts of right and liberty on the man — whose satisfaction with the order must be found in his membership of the state, honorable and eminent in the family of nations. Its great purpose was the development of the *πόλις*, not the security of the man — and his rights were subordinated to the power and glory of the state or the empire. Man was only a fraction of the mass.¹

Christianity, in its segregation of the man from the mass; in its personal demand upon his conscience; in its isolation of his responsibility; in its holding out immortal rewards for his individual conduct; and all this under a sense of obligation to the Supreme Being,—implant in the man such a profound consciousness of his accountability for his destiny as to make it a moral force, which dreads treason to the Almighty King more than all the threats of human power — and makes “resistance to tyranny obedience to God.”

It was this new inspiration of the human soul which has made modern civilization. It put into the man a sense of individual responsibility, which impelled him to a brave self-assertion of his right to liberty, as essential to his duty to God in working out his sublime destiny. This influence must be conceded by all, whether the Divinity of the system be accepted or rejected, as the great moral, social and political motive in modern progress.

This influence it is which has impelled man to challenge all power over his conscience and will; and to resist the abuse as well as the usurpation of ecclesiastical or political authority over his mind or body. It has demanded freedom of thought, of speech and of action. It has overthrown kingdoms, dethroned monarchs, changed dynasties, and rent asunder empires. These are the results of the doctrine of Christ — that it is not right for man to render to Caesar

¹Bluntschli, *Theory of the State*, ch. VI; Spencer's *Justice*, ch. 26.

what belongs to God — nor to obey man rather than his Maker.

This view explains the close connection between religious and civil freedom; and how the revolutions which have saved Anglo-Saxon liberty have united the civil rights of men with the freedom of the human conscience. This alliance made the English commoner cling to his civil rights with an enthusiasm which tyranny over a quickened conscience alone could arouse. Civil liberty under the inspiration of religious duty shattered the Eikon Basilike,¹ and upon the ruins of *jus divinum regum* erected the edifice of constitutional government. And the historian who sees in the struggles of our race, which have evolved the free institutions of England and America, nothing but the efforts of man to assert the cold abstractions and canons of a violated social compact, has omitted to see and estimate the power of a religious enthusiasm, which feels the inspiration of loyalty for a Divine King in every blow struck for the security of personal freedom against human despotism.

§ 22. The germ of royal responsibility to law under the Hebrew Commonwealth is found in the words: "He (the king) shall write him a copy of this law in a book . . . and it shall be with him, and he shall read therein all the days of his life; that he may learn to fear the Lord his God, to keep all the words of this law and these statutes, to do them: that his heart be not lifted up above his brethren, and that he turn not aside from the commandment to the right hand or to the left: to the end that he may prolong his days in his kingdom, he, and his children, in the midst of Israel."²

In this prophetic constitution for the kingly power, we see no warrant for its perpetuity or for irresponsible autocracy deduced by the Filmer school—but we find the

¹ This means "Royal Image," and him. John Milton wrote in reply was the title of a book issued after the execution of Charles I, and the "Image Smasher."
² Deut., ch. 17, v. 18-20.
 reported to have been written by

germs of modern freedom in the three-fold canon—that the king should be bound to the observance of the written law as the charter of his power and of the rights of the people; that he should not be lifted above his brethren, nor turned to the right or left from the commandment made for him as well as for them; and that the tenure of his kingship was conditioned upon his observance of the written law of the kingdom. The Divine ordainment of government, and even of the prospective monarch (so he be not an alien, but a brother), is shown; but absolute irresponsibility and disregard of the rights of the people are not only not sanctioned, but are plainly condemned.

In the New Testament, Christ himself draws a clear distinction between rights which are subject to the civil power and those which are not.¹ In the apostolic answer to the Sanhedrim, the assertion of religious rights which the civil authorities cannot touch, is distinct and emphatic.² Paul enjoins obedience to the powers that be, as the “minister of God to thee for good,” thus making government a minister who holds power in trust for the people.³ The trust purpose of political power, and the duty of human obedience, are set forth as interdependent, making the observance of both of equal obligation.⁴ And the same principle is enjoined by Peter the Apostle.⁵

The exodus of the enslaved Hebrews from the Egyptian rule under the prescriptive title of centuries; the selection of the first kings by the voice of the people; the secession of the ten tribes because of the oppression of Solomon’s son,—were under Divine sanction.⁶ These facts in Jewish history reprobate the *jus divinum regum*, and enforce the doctrine of kingly responsibility for the duty of protecting the rights of the people. The error of the Filmer school is not in deducing from sacred history the Divine ordination of govern-

¹ Luke, ch. 20, v. 21-25; Matt., ch. 22, v. 16-21.

² Acts, ch. 4, v. 19.

³ Romans, ch. 13, v. 2-4.

⁴ 1 Tim., ch. 2, v. 2.

⁵ 1 Peter, ch. 2, v. 13-17.

⁶ 1 Kings, ch. 12.

ment, but in maintaining that it was ordained with absolute, and not with limited, power—without duty, and not under trust—regardless of man-right, instead of for its protection—irresponsible and a permanent tenure, rather than conditioned upon the due observance of the law, as the constitution of the monarch. He deduces all kingly power as a transfer from the patriarchal or family government, and claims that royal authority is by Divine right, because the *patria potestas* was constituted by God. But his error is fundamental, when, even with the concession that the king is the successor to the father's power, he fails to see that, in the Divine constitution of the family, the parental power is not autocratic, but delegated—and not absolute, but in trust for the good of the subject.

Milton, Sidney, Locke, and all the religious civilians of the seventeenth century substantially concede the premises of the Filmer school, with the qualifications above mentioned, and thus deny utterly its absurd conclusions; not only in their writings, but in the Revolution which during the throes of half a century condemned to death one hereditary king, deposed another, and elected an alien to the throne, under a monarchy constituted on written charter, in the memorable year 1689.

§ 23. The compact theory of Locke, Rousseau, and others also fails to meet the conditions of this great problem. For as already shown, it has no historic truth, and could never have been the basis of political society. And if the non-alienability of a Divinely vested personal right has been successfully established, from the trust duty coupled with the gift, no compact could bind the parties to it which proposed to give away what was inalienable; and much less could it bind those not parties to it, and born after it was entered into. And *a fortiori*, the dogma of Hobbes and his followers, or of the utilitarians, is inadmissible, which makes alienation of rights to government irrevocable and forever binding, not only on the contracting generation, but upon the unconsenting posterity forever.

§ 24. The true philosophy of this vexed question then must be sought in the historic facts, which an induction has found: Society grew from the primal pair, the dual-unit of humanity; the children with them made the family, the germ of all Bodies-politic; the *patria potestas*, the germ of all governments, is supreme, not absolute; delegated, not autocratic; and with authority to govern, as guardian of the rights of its subjects. The family grew to a patriarchy—a union of many of these from kindred or other ties, made the nations which have filled the Earth. The Divine ordainment of the primal government therefore proves that the latter was made for man, not man for government; and that Society and Government were the Divinely constituted means for the good of men—and that no political power is legitimate which violates and does not conserve Man-Right: that as the *ἐπίτροπος* (the guardian) of Plato, it must protect and uphold the rights of men, and not assail and destroy them. From all which it follows, that when the guardian fails in duty, or wickedly destroys right, its ward may take measures to remove the faithless governor, and substitute one who will better subserve the ends and purposes of the Divine constitution. Power is not, Right is, immortal. Political power must cease when it fails to subserve the rights of man. The Patriarcha of Filmer (writing in the interest of the House of Stuart) maintained *jus divinum regum*. The American constitutional school bases Political Science on *jus divinum hominum*!

§ 25. In this statement it will be seen there is involved, as a limit on power, that it shall conserve the rights of man. It becomes proper then to define these rights of man more precisely than has been done.

If we regard the new-born member of society, with his undeveloped germs of future life, powerless, helpless and hopeless but for parental love, what are his rights which God thus intrusted to parental power?

His right to life, and to its preservation in healthful growth, is God-given. The parental power is given not for the parent's good, but linked to a duty to the child; a power which

has no title to be, if divorced from that duty. Infanticide is the exertion of parental power; but is criminal usurpation, because a violation of duty. No parental power is legitimate which trenches on the right of the child. The power is a parasite of the duty; severed from it, the power dies.

The discretion in its exercise is unlimited, except by its object. All that is *bona fide* exercised for that object, in the way of restraint and direction, though under false judgment, can only be corrected by him whose right is imperiled. As he grows in capacity in self-development, the parental power decreases with his expansion; and, when maturity is reached, the right to self-use is complete, and parental power, gradually decreasing hitherto, now ceases. The duty of the child to God in the matter of his life is to submit himself to the wisdom of the parent, until he reaches the point at which self-direction is safe. When that point is reached, submission to others against his own conscientious judgment is error—it may be worse. And as it was the duty of the child in his incompetency to yield to parental direction, so now, in his matured competency, it is the duty of the parent to yield his former power of control to the hands of the adult child—for as the power only sprang from a duty due to his incapacity, it must cease when the incapacity ends. If the incapacity continues in case of idiocy or insanity of the child, the parental power and the duty, of course, continues, and the man's wardship is perpetuated, for such person has not the right of self-direction; for right to do is not predicable of one who has no capacity to do.

§ 26. What are the related rights of adults in social life? and what the relation of social power to personal freedom?

The right of every man is liberty of self-use, which involves that of self-direction. This arises from his distinct individuality of being as a creature from God. If man were alone (*ex hypothesi*) this liberty would find no limits, except in his capacity to control external things. Within the bounds of that capacity, his will would be unconfined. This is what might be termed the *liberty of isolation*. But as has been

shown, this solitude is exceptional, even if it ever had reality, and perhaps never existed, save in the imagination which delineated Robinson Crusoe. Let us look at its advantages and disadvantages.

The primal motive of human life is self-love — and its object, happiness; which is the status wherein the man is in harmony with self and with the external world. A man at peace with self and with external things is happy — at war with either or both, he must be the reverse.

His physique has wants — which the external world can supply. He needs food, raiment, shelter. When he supplies these in rude forms, his nature aspires for better. His appetite craves delicacies, his body demands improved raiment, and he changes the rough skins of animals for apparel which will combine beauty with utility. He is not content with a hovel, and must have a home of comfort and even elegance. This passion for external things, to minister to his comfort, taste and luxury, begets a propensity to acquire by art and skill these objects in improved forms for his growing desires and improved needs.

His moral powers suggest his needs — his mind devises schemes of supply — and his physique, under the direction of these, finds and moulds natural objects to meet his varied and defined wants: for these objects must be sought, subjected and moulded by his physique under his intelligent direction for his purpose. The animal and vegetable — the organic and inorganic — kingdoms offer innumerable objects not attainable for use, nor useful when obtained, except by the aid of his mental, moral and physical forces. These under command of his will are made efficient to lay Nature under tribute to his desires — when his moral force declares its purpose — when his brain lends intelligent aid to discovering the latent or unknown possibilities of nature — and when his physique fashions her unbounded resources to man's use — the raw material so transformed into new objects for the use and for the satisfaction of human wants, become objects into which he transfused himself, in which Nature is combined

with himself, and the resulting product in a large degree is part of himself — because his being is so confused with the raw material as to be unseverable and indistinguishable in the new product. Hence, such things are *propriae* — parts of the man himself — and are called in all ages *property*.

If man were isolate, natural law dictates that Nature in her possession of unadapted materials is open and free to his sole enterprise. Robinson Crusoe in his island home would have none his “rights to dispute, as lord of the fowl and brute.” But if another man were on the island, it is obvious that all the rights to external nature exclusive in the isolate Crusoe would be equally open to the enterprise of the new competitor for the supply of *his* need. “Thus his exclusive rights, the result of isolation, would be modified and abridged by the presence of those whose rights would be as unlimited as his own. The rights of each would thus be qualified in such a way as to deny the exclusiveness of any, and to admit the participation of all; and it would become the duty of each to admit right of all others, and so to qualify his own.”¹

It is obvious that the liberty of isolation is very different from the liberty of social life. He surrenders his *isolate* right and liberty by being in society, but he does not surrender his *social* right or liberty by being in society. The idea so often stated, that a man by entering into society surrenders some of his liberty to secure the residue, is therefore inaccurate, and suggests a fallacy. His social liberty is essentially different from his isolate liberty, but he is in society to secure all of his social liberty — that is, all of liberty which belongs to him *de jure*, as a social being. His social liberty includes all rights which belong to him as a member of society. These, though different from his isolate liberty, are all which he can have in social life — and to all of these he has full title in society, and surrenders none by being in society.

The extent of the abridgment of isolate liberty by man's

¹ Address of author at William & Mary College in 1854.

being in social life will depend on the "claims and necessities of his associates. If each cannot have all the rights he might have as a solitary being, he must have all which are consistent with the existence of the highest practical rights in others. If there be conflict, it must be reconciled by such a compromise as will attain the best development, the highest happiness and well-being of all. Neither part must seek for itself a greater elevation by the deeper depression of the other; but each must so adjust itself to a social equilibrium, that the maximum elevation of each shall be attained, and the minimum depression of each be avoided. Thus where two conflicting interests are combined in a society, civil liberty will consist in the preservation of that equilibrium, where the social rights of each so modify those of the other as to preserve to each the greatest amount of right and freedom consistent with their co-existence in social combination. In this there may be what appears to be an abridgment of liberty; but it is the abridgment of the liberty of *isolation*. It is not an abridgment of *social* or *civil* liberty, which is the highest liberty which either interest can enjoy consistently with their coherence in society."¹ These views are in accord with Herbert Spencer: "Every man may claim the fullest liberty to exercise his faculties compatible with the exercise of like liberty by every other man. . . . Every man has freedom to do all that he wills, provided that he infringes not the equal freedom of any other man."²

It follows further, that the maxim that the great object of government is to secure "the greatest good to the greatest number" is a perversion of all the true objects of social life. If this means that the greatest good to the greatest number may be secured by the sacrifice of the happiness of the lesser number, it is execrable; for in the social organism there must be no lottery of prizes to some and blanks to others. The greatest possible good to each and all is the true canon; for that secures perfectly all the social liberty of

¹ *Ibid.*§ 1; Spencer's *Justice*, ch. 6; Kant² *Social Statics*, ch. 4, § 3, ch. 6, in accord.

every man — that is, the maximum of good to each consistent with like maximum to every other. This is the equilibrium above spoken of, and is sanctioned by Spencer.¹

§ 27. And it is here proper to say, that, while isolate liberty is unlimited in *quantity*, yet social liberty is so much better in *quality* that the latter is not only greatly to be preferred, but it is the highest and best and indeed the only possible liberty for man. So that it is well the liberty of isolation is only ideal, and that social liberty involves practically all that is most to be desired by man.

A few observations will confirm this:

1. His inborn instincts make isolate life a curse, and social life a blessing. These instincts are affinity between the sexes, parental and filial ties, and yearning for sympathy, which can only be met by association with others.

2. His mind seeks fellowship with mind. Language, which his mind suggests and his vocal powers accomplish; music, never so charming as in harmony with others; thought, never so rich and pleasurable as in commerce; and worship, never so grand as in communion; all these are incitements and witnesses to the truth that “to dwell in the midst of social alarms” is better than “to reign in the horrors of solitude.” Moral support in sickness, trial and death; the outgoings of the heart towards objects of affection; the need for co-operative effort with fellows better to obtain even physical comfort, and, more important still, to achieve the purposes of the soul’s aspirations for higher life; all these would make man, if ever isolate, fly from the best solitude to any society; or when in society, shun isolation as a dreadful doom, and cling to any social life as the only status for the race.

These statements will suffice to show that the liberty of social life is incomparably superior in its quality to all that the liberty of isolation can offer. Its very limitations being the blessings of security, and mental and moral self-development to the noblest destiny to which the individual can

¹ “Justice;” “Social Statics.”

aspire, and which are impossible as results of isolated freedom. And thus social liberty is the highest possession of humanity — because with it man reaches the purposes of his best aspirations — while isolate freedom dwarfs the soul, and shrivels its every aspiration into brutish insensibility.

§ 28. Let us now look to the abridgments by social conditions of isolate liberty, which differentiate it from social liberty. The rights comprehended in liberty are *in persona* and *in re* — personal and property rights. In considering these, we come to a fundamental distinction between *Jus* and *Lex*.

Jus corresponds to the Greek *dike* (righteousness) and *θέμις* (Goddess of Justice), and the Latin *rectus* (straight), our English right, from *rego* — same root as *rex* — meaning the will of the Eternal Rex. *Jus* therefore means the abstract right — the will of God — precedent to and independent of all human institutions and human law. *Lex*, on the contrary (*lego*), corresponding to Greek *νόμος* (enactment), and *θεσμός* (radical — to place upon), is the enacted law of men.

Jus is the law of God — *Lex*, the law of man. St. Thomas Aquinas says: “*jus non est lex, sed potius id quod lege præscribitur, seu mensuratur.*” *Jus* is the abstract justice of which *lex* is the human expression and measure.¹ And this distinction seems to be recognized in Justinian’s Institutes.² Hobbes also asserts it with force.³

When therefore the terms *jural* and *legal* are applied to liberty or right, the distinction is clear. Jural liberty or right is what God gives; Legal, is what society or its government allows. The one being God-given is what the other ought to allow. The one is *de jure*, the other *de facto*. They should be synonymous — but have not been in human history.

¹ Cicero says: “*Nec enim alia lex Romæ, alia Athenis, alia nunc, alia post hac: sed et omnes gentes et omni tempore, una lex et sempiterna et immutabilis continebit.*”

² Lib. I, tit. 1, 2.

³ De. Corp. Pol., Bk. 2, ch. 10, § 5. See also Burlamaqui, Bk. I, ch. 752; Puffendorf, Bk. I, ch. 6, § 3.

§ 29. What jural rights *in persona* belong to man within the term "social liberty?"

This depends on his relations to others. These arise from particular ties, which include marital and parental and filial rights and duties, or they arise from general ties embracing the obligations of all contracts express or implied — the duties *inter se* of parties in sales, partnership, agency, bailment, trusts assumed voluntarily or imposed by law, and also all conflicting personal rights by misuse of one's own liberty to the injury of others.

The definition of limits between competing rights is a question for natural law and not for the subject in hand; but it may be said that Nature and Revelation supply two rules — the Golden Rule of Christ, and the civil-law maxim: *Sic utere tuo, ut non alienum laedas*. Justinian also says: "*Juris praeceptae sunt haec — honeste vivere — alterum non laedere; suum cuique tribuere.*"¹ In all the relations of persons, their jural rights may be decided by these rules, and the legal enactments of society should conform to these.

§ 30. What jural rights *in re* belong to man within the terms of his social liberty?

The origin of property has been the subject of much acute and learned discussion — with which this work has nothing directly to do — but the jural principles which underlie it may be stated, for their important bearing on political science. Property in self has been spoken of as involving the title to self-use. A man belongs to himself — subject only to God's right in him. All that is of objective value, which is the exclusive product of his self-use, belongs to the man.

Instance his thought — his idea. It is his own exclusively — for how can another get it but at his will?² Disconnected with matter, idea is an entity of value — of money value — and man has such a jural right attaching to it, that legal title to it is recognized in copyright and patent laws — so that no

¹ Lib. I, tit. I, § 3.

if my heart were in your hand; nor

² Othello: By Heaven, I'll know thy thoughts! Iago: You cannot, Othello, act III, scene 3.

one can combine another's thought with his material property, unless he pays for the intangible and invisible idea.¹ If A can claim title to his idea, which in contact with the insensate matter makes it a thing of life and power, how can B claim title to the resulting product, into which A has breathed his vitalizing thought, unless B has some better right than A to the original material?

This jural right of each man to his own thought is so recognized in the Roman and Common-law jurisprudence, that B's property, if wholly transformed into a new thing of utility by the genius and art of A, becomes A's rather than B's property, with allowance of claim by B against A for the value of the original material; unless the taking of the latter by A was a wilful trespass.²

This evidence — *communis consensus* — as to the jural right in such cases, would show that if A bestows labor of brain or physique upon *res nullius* or *res communis*, he must be held jurally to own the product by reason of the commingling or confusion of his labor with the original material;³ and this idea of property is vindicable upon another ground hereafter stated.

But the question still remains — what is the basis of property to things in their natural condition — movables and immovables?

Let us consider that "dominion" which God gave to man "over all the earth,"⁴ to which Blackstone refers in his Commentaries,⁵ and adds, "the earth, therefore, and all things therein, are the general property of mankind, exclusive of other beings, from the immediate gift of the Creator."

Perhaps the best view of the relation of mankind to the earth is this: The Creator placed man upon the earth covered with organic and inorganic material to be fitted for his

¹ Spencer's Social Statics, ch. II. Social Compact, ch. 9; Locke, Civil

² Schouler, Personal Prop., ch. 2; Gov., Bk. 2, ch. 5.

³ Domat, Civil Law, § 2160.

⁴ Genesis, I, 28.

⁵ *Ante*, § 26. See also Rousseau's

⁵ Blackstone's Commentaries, Bk. 2, ch. 1, p. 3.

comfort by his labor, and with endowments to assume and hold dominion over them. As this is the fact, it is rational to presume it was the ordainment of God.

Property in all this was not vested in man, but was offered to his acceptance for tillage, and the use of its animals for food and clothing. Like all the gifts of creation, they must become ours, only on condition of their subjection to our use by our labor of brain or muscle. All Divine bounty is only consummate upon acceptance through labor in some form; even light and air may be accepted or rejected. Natural fruits and water must be found and gathered for use. Trees must be felled for fuel and shelter; animals *feræ naturæ* must be hunted and killed for food and raiment. Land must be cleared for tillage; timber and stone procured and felled for houses; springs sought and wells dug for water.¹ In all of these cases, which look to individual holding of external things as one's own, or as property, personal labor is so mixed with the original object as to make a new product, combination of the raw material and man's work.

Thus, the truth seems to be this: God gives to him who will take for use through labor—not to the sluggard. “In the sweat of thy face shalt thou eat bread.”² And with respect to the best of Divine gifts, it is said: “Whosoever will, let him take the water of life freely.”³ He may take what he needs for his personal use and make it his own, leaving what he does not need for the supply of others in equal right with himself.

Cicero illustrates this well by right to the seats in a theater, where the first occupant of one, when seats are free to all who will come, has best title thereto. *Qui prior est tempore potior est jure*. He says: “*Sed quemadmodum theatrum, cum commune sit, recte tamen dici potest, ejus esse eum locum quem quisque occupari: sic, etc.*”⁴

¹ See this illustrated in the Patriarchal era. Genesis, ch. 21, v. 30; ch. 26, v. 15–18.

² Genesis, ch. 3, v. 19.

³ Rev., ch. 22, v. 17.

⁴ De Fin., lib. 3, ch. 20.

Let us test this by a case where A and B compete for title to a thing adapted to human use, *e. g.* a house, an arable field, a well, clothing, food, or the like. A has taken a natural object, and by his individual labor has transformed it into a thing for use and comfort. B claims that the gift of Nature to mankind entitles him to partake of the benefit of the new thing because of his equal right with A to the original object. He says his right was equal to A's for the original thing, and why not to it in its transformed state?

In answer to this claim, A may say that the offer was made to all alike, he accepted and B did not; that his acceptance still left to B and others a fair share of what Nature abundantly supplied for all; that if B had equal right with A to the natural object, but no superior right to him, yet as A has supreme right to himself and B has no right at all in A, the product of the combination of A's self with the natural object gives A a better right than B can claim to the product; that, even where no labor was put by A in the natural object, yet, as the rights were equal, if enough be left for B and others, there is every reason why possession should give title to A — and even if there be not enough for all, B's claim against A's possession would only be for his share on a partition between all, which would be infinitesimal; and finally, if length of time has created moral claims from association to the thing possessed by A, and further the tie of affection, there is just ground to add to the possession the inference of a presumed acquiescence in it by all, which is the title by prescription — for as the civilians put it, the owner is presumed to possess, and *e converso*, the possessor, after long time, may well be presumed to own.¹

In what has been said, the right of one to take is only equal to that of every other; and hence, one may not take so much as will exclude others from a fair share in the things provided by the Creator for the use of all mankind. Rousseau said that while one may occupy vacant land, yet

¹Domat, Civil Law, §§ 2185, 2139.

"no greater quantity should be occupied than is necessary for the subsistence of the occupiers."¹ This indicates a truth which, however, cannot be so strictly confined. It is a protest against monopoly, but must not limit acquisition merely to subsistence.

In this view will be found the vindication of the doctrine of *Johnson v. McIntosh*,² where the unlimited claim of the nomadic Indian was confined within limits which would allow God's gift of a virgin continent to be used for the life of hundreds of millions of civilized men, rather than give a monopoly of it to a few hundred thousand savages. The jural right of every man and of every race must be limited as all social liberty has been shown to be, by the co-equal rights of other men and races brought into association with them.³ The reader will note the analogy between these jural principles and the pre-emption laws of the United States, which prevent monopolizing grants to any one, and give preferable rights of purchase to him who has expended his labor in making a home on any part of the public domain.

It is proper to notice the views of Mr. Herbert Spencer in respect to the right to property in land, distinguishing this from all other property. As to all property rights, except land, he is not in antagonism to the general view already presented; but as to land he maintains that land belongs to mankind, and therefore to society and not to the individual. He suggests that the State should lease at some fair bidding free to all; the lessee paying rent will own the residual product of the land as his own (for he has mixed himself with it). This being his property he can buy other things. Why not buy land of the State? If so, land-holding with its supposed evils begins again. If leasing but not sale be allowed to society, as the feudal land-owner, then the evils of paternalism (which none condemns more than Spencer) will be the doom of social life. The remedy this able writer pro-

¹ Social Compact, Bk. I, ch. 9.

² 8 Wheat. 543.

³ *Ante*, § 26; Maine, *Ancient Law*, ch. 5.

poses, besides the obvious difficulty of carrying it into practice, would be worse than the disease.¹

Besides, as above suggested, why should not the right of the lessee to the fruits of the soil be legitimately allowed to pay society for the permanent as well as for the temporary use? Why not permit him with his own money to buy from society the freehold as well as the leasehold? or the leasehold for a thousand years as well as for ten? If all this were allowed, we should have what we have had in all ages: an original ownership of all land by the State, distributed by sale or voluntary grants to individuals. If we reverted to this original condition according to Spencer's principle, history would only repeat itself, in bringing us to our present status after a few generations. What the public will should be careful to control is the tendency of men, greedy for power or wealth, to take hold of the political machinery and to regulate it in such wise as to grant a monopoly of landholding, or any other property holding, to the fortunate few, at the expense of the unfortunate many.

The principles thus far established explain the way in which property rights have arisen in all the ages. Nature is *fera natura*; it is only when touched by the wand of man's genius that it acquires value for human use and becomes his own (*propria*).

Discovery, which is so potential an element in the title to external things, is the result of man's enterprise, sometimes of daring energy directed by a master mind. In the competition of children in search of shells, the first finder has conceded to him the preference of right. "I found it first," is recognized as giving a priority of claim. But in such cases, if the finder does not appropriate the thing found, it is left for appropriation by a succeeding finder. The trover must be followed by occupancy in order to title—for occupancy for permanent holding is, as Mr. Maine says, "the *advised* assumption of physical possession."² Lord Stowell makes

¹ "Justice," ch. II; Social Statics, ² Maine's Ancient Law.
Part 2, ch. 9.

discovery give *jus in rem*, an inchoate title—but occupancy following, gives *jus in re*, the consummate title.¹ In these cases, the moral, mental and physical functions of the man or nation combine in purpose, thought and bodily labor to make *res nullius* or *res communis* the *res propria* of him who discovers and occupies. Thus the bold enterprise of Columbus, followed by occupancy, gave the title of a continent to Spain, at the foot of whose throne it was laid by the genius of the discoverer.

We have by the inductive method reached these primal truths of human philosophy, which revelation sanctions—a rational induction, independent of the teachings of revelation, yet in entire accord with them—that the Divine title to self is the foundation of the Divine right of man to property in external things. This independent process of reaching these primal truths is the tribute which human reason pays to Divine revelation. And all the writers to whom reference is made have quoted and relied on the evidence derived from the Scriptures as a basis for their reasoning and as authority for their conclusions.

§ 31. Bearing these conclusions in mind, it will be instructive to deduce some important corollaries from this simple analysis of the power of the Body-politic and the liberty of the man—as the former is the ordained means and agency for the conservation of the latter, which is the direct gift of a beneficent Creator.

First. The absolute and unwarranted tyranny of all laws which invade the freedom of individual conscience in the worship of God. For how could government be presumed to have been vested with Divine power to intrude upon the personal liberty of the man in paying his personal homage to God, under a sole personal responsibility to Him?

Second. As man in his personal independence of being has exclusive title to his own faculties, of brain, will and physique, with a title to exclusive self-use, it follows that the products of self-use of these, being the things into which he has

¹ 5 Robinson's Adm. 114; 1 Phillimore, Int. Law, 247; Hall's Int. Law, ch. 2.

transformed or converted natural objects for human use, are as much his own as were the faculties by means of which they were produced. They are, in truth, a part of himself, because he has commingled a part of his real self with the natural objects from which they are made; and as this commixture cannot be resolved into its original elements, these transformed objects are recognized as his own, and are what we call property (*proprius* — a part of self). Labor (which is self-use) added to raw material makes the mass of objects of property among mankind;¹ and the right of property, therefore, is an essential branch of the rights of personal liberty — a right for which, as we shall hereafter see, men have made their greatest struggles for free institutions.

Third. If B takes A's property by force for his own use, it is equivalent to a claim of mastery by B and of a condition of servitude for A. And when government by form of law takes the property of A and gives it to B, whether by direct confiscation or by indirect means, it is a violation of duty and a usurpation of power. "It is none the less robbery, because it is done under the forms of law, and is called taxation."²

Fourth. Laws of monopoly, whereby special privileges are conferred on the few at the expense of the many — or for agrarianism, which divides the accretions of thrift and economy with the idle and wasteful — or for communism, which shares the fruits of toil with the worthless drone — all such destroy the equality of right which each man has in the exclusive use of himself, and subjects him and his property to spoliation and plunder.

Fifth. The oft-made assertion, that inequality of wealth among men is contrary to natural right, is wholly untrue. We have seen that men differ in their endowments and hence in their capacity and desire for the acquisition of property. Their acquisitions, therefore, must and do differ

¹Locke on Civil Government, § 44. 664. *Accord: Fletcher v. Peck*, 6

²*Loan Ass'n v. Topeka*, 20 Wall. Cr. 87.

largely. The "economy of industrious poverty," in contrast with the unthrift of the idle and of the prodigal laborer, makes a contrast of comfort and well-being even among the members of the poorer classes.

So far, therefore, from an inequality of condition being contrary to equality of right, it would be the greatest violation of equality of right to enforce an equality of condition.

§ 32. Having thus deduced the personal and property rights of man — these jural rights — from man's exclusive liberty of self-use to the fruits of self-use, it is necessary now to say that these jural rights are not always realized in the legal rights; that is, in the rights allowed to the man by the social polity under which he lives. But while this is so, we must not forget that the jural are none the less real because the social polity does not make them legal rights. The *jus* cannot be abrogated, but ought to find full expression by the *lex*.

§ 33. These jural rights of man, constituting in their aggregate what we call his liberty, have, as we have seen, been given to him by his Creator to be used under responsibility to Him. Can he rightfully surrender them? Is he not religiously bound to defend them?

We have further seen that society is ordained by God to conserve the rights of man and not to injure them. These rights embrace life (limb, health and self-use as part of life) and property as the results of life work and enterprise. To conserve these society is ordained.

As man holds all these rights in trust from God, he breaks trust by their surrender, or by not defending them. Hence self-preservation, embracing self-defense and self-development to the highest degree possible, is a religious duty. Man not only may, but must, defend himself. Self-defense is not merely a right, it is a duty — a religious duty. If he held his rights absolutely, he would have a mere right to defend them and might waive them; but as he holds them in trust for God, he is bound by religious obligation to defend them.

In self-defense, therefore, man defends not his own, but God's right in him. And thus it comes to pass, under every well-ordered human polity, that this self-defense has the best sanction, in that the man is to be regarded as the jural instrument for the *lex*, in what he does to the detriment of, and then in defending, his right.

As Society is ordained to conserve these rights, it follows that it cannot violate them — jural power cannot infringe jural rights. Governments have trampled on them — without jural power to justify them — and man-right has been destroyed by the power which God ordained to conserve it.

In this sociological discussion of the relation of man to society, and to the government, which is the organic social force, we are brought to the threshold of Political Science — and are confronted with the inquiries: How can *de facto* power be made to conform to the jural standard and made to respect jural right? What redress — what protection — has right against un-jural power? Must the man abandon his right because power denies it? Is power irresponsible to right for its wrong? And how is the organic social force to be so constructed as in its administration to protect, and not destroy, man-right? Must the jural rights of man perish under the usurped dominion of *de facto* and un-jural government?

§ 34. If society and government were ordained for man's use, and to protect him in his liberty of self-development, it is now proper to look to the results of this Divine ordainment in the annals of mankind.

§ 35. The most cheerless chapter in human history is the account of how political power has failed in its trust duty to protect man-right, and has consistently perverted its authority so as to abridge and even destroy human liberty; and how stupid the man has been to perceive, how stolid to appreciate, his Divinely conferred privilege, and how tamely he has submitted to the despotism of the ages.

The causes for this departure from the Divine scheme must

be explained as a sad, but instructive, preface to the history of the rise of free institutions.

§ 36. The primitive society was the family—the personal government—the *patria potestas*. It has been shown that the instinct of parental love was designed as an incentive to good and just government of the offspring. During childhood this would naturally operate upon power so as to conserve right. But when the parental power became patriarchal over matured sons and daughters, and their children, the tenderness of the father to his young children would be substituted by the more stern and rigorous display of authority over them, when, with diverse purposes and other homes, they sought to break away from the traditional control of the patriarch.

But why should matured manhood yield obedience to the parental power which had controlled childhood? If we consider what creatures of habit we are; how the actual is regarded as right, because it is and has always been so; how our environment is accepted as normal, because natural; how filial reverence and affection silence the cavils at parental power, and induce submission, even when restive under restraint; how gratitude for nurture during infancy begets obligation to repay to age the obedience and deference it exacts,—we shall no longer wonder at the enormous influence of patriarchal power in archaic society, or that the desire for liberty yielded to the customs of the household, “which put on the character of law.” The impulse to be free from home-rule was checked by love for parents, brethren and the old homestead; and if other neighboring patriarchs were inimical, by the value of the family band of which he was a part, to resist his foes and to uphold his interests. These motives would turn him from his purposes to fly from home, and would tend to perpetuate the family society and the *patria potestas* as of great advantage to him.

Even in modern society, how many cases occur in which grown sons remain at the old home under parental power; and are only released from this filial submission to the chief

of the family when death removes him. If this occurs in this era, how easy to conceive it in primitive society! The Homeric picture in the *Odyssey*, and that drawn by the writer of *Genesis* (both cited by Sir Henry Maine¹ as sketched from life) show that archaic society "was not a collection of individuals," but "an aggregation of families."

§ 37. In this primitive condition of society, we thus see how a compact union between the descendants of a Patriarch would result, in which the ultimate authority would be conceded even by strong and able sons to the long recognized and venerable will of the Father-Chief. The energy and sagacity of Judah, and even the wisdom and civil power of Joseph, bow in filial deference to the determinant will of the aged and feeble Patriarch Jacob.²

This is in accordance with natural principles; history teaches it, and our own reason and experience confirm it. Such a status was constituted without pre-consent, and was established by nature, with the acquiescence of the members of the family or patriarchy. No better substitute could be found for it, which all would acquiesce in — and the *status* continued. The father had the start in power over his child's liberty, and kept it with the child's acquiescence. The son might chafe under the parental yoke; but without the concurrence of all he could not overthrow it and establish any other rule. "To yield to superior power is an act of necessity, not of the will," says Rousseau; "an act of prudence, not of duty."³ The man thus submits, or as an alternative flees from his home; this is the equivalent of expatriation. His environment is as inevitable as the air which encompasses him. If he flees from it, the solitude of Cain is his doom — a doom as abhorrent to man as vacuum to nature. He can endure the life of his native home despite parental tyranny, but the solitude he would find in leaving it is worse than death. Man will bear despotism rather than isolation. He must, *ex necessitate*, submit to a rule against which he can only protest.

¹ *Ancient Law*, ch. 5.

³ *Social Compact*, ch. 3.

² *Genesis*, ch. 42 et seq.

§ 38. If it be asked whether this patriarchal power be absolute or in trust, jural as well as actual, and whether parental authority can be *de jure* converted into tyranny, the answer will vary with different authors.

Sir Robert Filmer, believing in the *jus divinum regum*, would answer affirmatively, for he holds all power is derived from Divine investiture.

John Locke and Rousseau, who believe that the claim to legitimate government is based on contract, without which it cannot be *de jure*, would answer that it is wrongful and not legitimate, because not so derived.

The true answer is this: Though the primal parental power was ordained of God, it was not absolute, but in trust; therefore jural only in so far as it conserved the man-right for which alone it was ordained, and that no power can be jural, however derived, which defeats the Divine purpose for which it was conferred; nor can any Divinely ordained authority find warrant in its charter of power for any tyranny over man. It is akin to blasphemy to claim Divine sanction for a tyrannical use of power, because jural power was Divinely conferred for the protection of the right which tyranny destroys: to trace to the Creator the wrongdoing which his usurping agent has done under Divine authority to do right. Government has power to do wrong, but no right to do so. Right is power in dutiful exercise; power plus duty. Tyranny is power in exercise regardless of duty; power minus duty. This distinction between power and right — between the power to do and the right to do — is fundamental and essential.

The Divine order was for the good of man. The human instruments of carrying out that order have perverted it into fearful evils and brought untold disasters on the race. The Divine means to bless mankind have, by human sin, been so perverted as to be a curse to him, the destroyer of his rights and the foe to his liberty.

§ 39. The outgrowth of every nation forming a kindred race descended from a common ancestor, enlarged by the

process of adoption, is based, not only on the facts of liberty and the exhumed record of extinct kingdoms, but upon rational deductions from the nature of man. They are very fully set forth by Maine.¹ As successive generations of this race come upon the earth, growing from infancy to maturity, they are subject, without regard to their volition, to the existent polity, with whose original institution they had nothing to do, to whose power they never consented, whose authority, though they may protest, they can neither avoid nor resist. The man is bound to the environment of birth by a necessity from which he may revolt by expatriation, but in which, while he remains, he must acquiesce, because he can neither successfully resist nor change it by his own will.

The causes of this universal fact in human history it will be instructive and interesting to examine; why does man tamely acquiesce in a *status* in which his right and liberty and happiness are sacrificed to the will of a tyrannical despotism? Why will the instinct for individual freedom yield to the social instinct which binds him to the domicile of birth?

(a) In primitive society man's ignorance of this right, his duty and his destiny to the prescriptive possession of power under the existing order of things, would make him content with the animal life without the higher aspiration of an advanced civilization, and induce quiet submission to absolute power, rather than the heroic assertion of liberty of which he knows little and cares less.

(b) As the world grew more populous, vacant spaces for isolate life decreased, and isolation became impracticable; but if practicable, would it be desirable? On the contrary, the average man would prefer social life under a despot to the liberty of isolation. The alternative would be expatriation, but this would only result in an exchange of masters; and wherever he might go he would be confronted with the same bristling prerogative of power and a like disregard of liberty.

(c) Man was and is often tied by poverty to the domicile

¹ Ancient Law.

of origin by a bond he cannot break if he would; perhaps would not if he could.

(d) But further, suppose he chafes at what others approve and is restive of the government which others support; how can he change it without their co-operative consent? If he dissents from restraints to which they consent, how can he get their consent to the change which he desires? All are bound together in one nationality, and the government for one must be for all; but if he and many wish a change, how can these obtain it if others refuse, without the use of force; and is a chance of change worth the blood of the conflict, or would force be rightful by the reformers against the conservators of the existing order of things?

(e) But are the advocates of change sure it would bring practical good — if they pull down are they sure they can build up a better structure of government? Are the co-operators in the reform agreed upon its terms; or as to what each would esteem an improvement on the existing order?

(f) The political is so closely united with the social edifice — the roots of polity are so intertangled with those of society — that to tear up the one may be the destruction of the other, and social relations may be wrecked by the upheaval of the government. This was one of the most powerful reasons urged a quarter of a century ago, and now in England, against the disestablishment of the national church and against other radical reforms, seemingly good in the abstract, but fraught with danger to society which made statesmanship halt in its progress.

(g) But if on the ideal theory of compact, or on any other theory, a change is proposed in the polity of people, how can it be effected? If on the former theory, the consent of all must be obtained to the compact — it cannot be compact if any dissent. On this theory all change is impracticable, and if the *jus majoritatis* be assumed as rightful, of what shall your majority be constituted? on restricted or universal suffrage? Shall all men, women and children be included? If not all, who shall be excluded and by whose fiat? Is it

not obvious, if we upturn the existing polity and set it aside as illegitimate, that the difficulty arises as to the terms of reconstruction upon which the millions of any of the nations of Europe or elsewhere can be so organized as to rebuild a new edifice on the ruins of the old? These causes suffice to make men

“Rather bear those ills they have,
Than fly to others that they know not of;

.
There’s the respect,
That makes calamity of so long life.”¹

Man cannot fly society; he cannot destroy it, for that is anarchy. Change may not be reform. To attempt it by social revolution — by setting aside all the existing polity — is temporary suspension of social life; and how can its revival be effected — and what will be its consequences? Man, therefore, shrinks from revolution as from social and political suicide. It is the last resort of freedom against intolerable tyranny. *Iustum bellum quibus necessarium; et pia arma quibus nulla nisi in armis relinquitur spes.*²

§ 40. Wisdom, in dealing with a question involving such momentous results, will direct us to the most practical remedy for existing evils with a satisfactory assurance of real good from the proposed change in polity.

These considerations dictate that, in all revolutions which promise success, we must not attempt any scheme which sets aside as illegitimate the existing order of society and starts our new polity upon any abstract theory of what ought to have been or ought to be now and for the future. Wisdom dictates that we must start with the concession of legitimacy of organism somewhere, out of and through which we may evolve the reform polity we aspire to establish.

Man must accept the *de facto* social polity as his initial point. *Ex hypothesi* it must be regarded as the legitimate government, because the alternative is social anarchy. If you reject it because it exists without your consent, what

¹ Hamlet, act III, scene I.

² Livy, Bk. 9, ch. 1.

movement can you make which will have universal consent, and, if not universal, in its absence the consent of any portion against the will of the remander will lack the essence of legitimacy as much as that you reject. We must have an initial point of departure. Dissolve all existing organization, and how can anarchy construct any other?

This conclusion of reason is confirmed by all revolutions in modern times. The English Revolution of the seventeenth century, the American Revolution, and the French Revolution of 1789, all assume, *ex hypothesi*, that the Parliament of England, the Assembly of the three Estates in France, the Legislatures of the Colonies in America, were legitimate. Back of them the chasm of social anarchy yawned, and the wisdom of those periods effected their great reforms in polity through the agency of those established organisms; *de facto* powers indeed, but assumed as *de jure* in order to an initial point conceded as such by all men.

It is not contended here that this assumption of legitimacy for the *de facto* government is *essential* to the validity of political revolution, but it is meant that except in anomalous cases where the agency of the *de facto* government is impossible, either because it is destroyed, or absolutely refuses to be auxiliary to the reform movement, the use of the *de facto* order as an agency of reform is most desirable and is best when it can be secured for the purpose. And without anticipating a definition of legitimacy in polity, we may say now that the government *de facto*, having by prescription at least colorable title, against whose claim by common consent no better title can be asserted, may very reasonably be taken to be the representative of political legitimacy. Mr. Guizot¹ defines political legitimacy to be a "right founded upon antiquity — upon duration." This is practicable legitimacy, though, as he says, true legitimacy is that "of reason, of justice, of right."² To avoid anarchy and the chaos of a resort to ideal legitimacy, wisdom will dictate, as the initial point of our reform movement, the

¹ Guizot's Civilization, p. 63.

² Guizot's Civilization, p. 65.

acceptance of the *de facto* order as practically legitimate for our purposes.

In the French revolution of 1848 Lamartine began his movement by the arbitrary assumption of power for the provisional government proclaimed by him and his associates, setting at naught the *de facto* authority of the kingdom. The King had fled, and Lamartine usurped by the voices of the populace the executive function in order to an initial point to the revolution. This was done as a substitute for the *de facto* power which had been abdicated.

When, therefore, acquiescence in an existing order is found by men to be dangerous to their liberty and destructive of their rights — when men demand reform in government because the government ordained as protector has become the destroyer of man-right — what must he do? Is he bound to submit, or can he resist and force a change?

The answers to these questions will be found in what has been already stated. Man's title to his liberty is from his Creator. It consists in self-use of endowments bestowed on him, under trust responsibility to God. God ordained society as the school of the race, and government as the organic social force was ordained to preserve social peace and order and to conserve the liberty of man.

These things being established, the related order of these social elements is thus: Man trustee of his liberty for God; society the Divinely ordained trustee for man; and government the Divinely ordained trustee for society. Man is the object of all this Divine arrangement. They are ordained for him; not he created for them. His liberty and right of self-use is the essential object of this Divine arrangement; their power is to be exercised for him — not over him. His good is the *ultimatum* of all their use of power, and their power is only legitimate in title or in exercise when it does justice to him in the protection of his right and liberty. But we have established another point: Man has not only the right of self-preservation, but God has made it his duty. It is his primal duty, therefore, to see that the Divine means

ordained for his protection shall not be perverted to his injury or his destruction. Man is under obligation of duty to take care that these Divine means, clothed with trust for his right, shall not be perverted into tyrannical defiance of the trust. He may reform this potential agent if he can — change it entirely if needed — and resist its usurped authority if he must.

To sum up, power and right are correlated. Both are Divinely ordained. Political power is vested in trust for man; right is vested in man in trust for God. Right is primal; power secondary. Right is fundamental; power is ancillary. Right is the end; power the means. Right is the good to be secured; power the minister — the servant of right. The Divine constitution is not *jus divinum regum*, but *jus divinum hominum*.

This political philosophy is that which has the sanction of Christianity and of reason. It is not the result of social compact, but the logical consequence of that intense individuality of man arising out of his sole responsibility to God, to conserve and develop which society and government were Divinely ordained. Right is God-given, and is neither given nor can it be taken away, but must be protected by the politico-social power.¹

§ 41. This philosophy was but little known to the ancient world. The State, not the individual, was the central object of the ancient political philosophy. Christianity, as we have seen, was the new force in modern civilization which made man the primal object and the state the auxiliary means for his good.² The writings of Milton, Sidney and Locke, of the French, English and American authors of the eighteenth and nineteenth centuries, while differing in abstract theories, have reached in a large degree results like to those to which our reasonings have conducted us. The great State papers of our Revolutionary period confirm them, and these results may be thus stated:

¹ Guizot's *Civilization*, chs. 1 and 2; ² Bluntschli, *Theory of the State*,
1 Lieber, *Political Ethics*, § 33. Bk. 1.

First. The government has no just right to power which it perverts to the injury of the right it was ordained to protect.

Second. Man, whose right is to be conserved, is bound by religious duty to use all means in his power to reform, change and reconstruct the government, so as that it shall conform its action to its trust duty to him.

The language of the Declaration of Independence is distinct and clear on this point:

“Whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its power in such form, as to them shall seem most likely to effect their safety and happiness.” . . . “When a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.”

The fifth article of the Bill of Rights of Virginia, adopted June 12, 1776, is in accord with this:

“5th: That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community: of all the various modes and forms of government, that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.”

§ 42. The next question presented is, how shall man perform this duty of reformation, change and reconstruction? As a man is not alone but in social union with others, there must be a concurrence of action among the members of society in this matter which concerns all. The *coetus* — the

aggregatio hominum — the people — must do this. But who are the people, and how must the people act? We have previously defined the Body-politic¹ to be “the organism in unity of the many human beings, associated by jural bond for the objects of the social state, in which is *vested* all *rightful* political power over its members for the common good of all.” This Body-politic is composed of all the men, women and children in society. Each has his distinct individual right; for each society and government is the ordained trustee. Each, *de jure*, has a will of his own, and should have a voice in what is proposed; for if A and a thousand others wish a change, and B and a thousand others do not, or if all wish a change, but differ as to the new order, how is a decision to be reached? If A were alone in his isolation, he would have sole liberty to decide; but being associated with others, his liberty must be made consistent with the like liberty of others. How shall this action of all be now attained?

§ 43. At this point we have reached the domain of the “social compact,” if practically it can ever be reached, for all who hold this theory admit that in order to validate social compact all must consent. If all, therefore, consent to a change and to any proposed form of change, the theory of social compact would prevail.

But in history and human experience no such unanimity has ever been reached. If, by the theory, it is essential in order to legitimate change, then it results that no change can be made and the existent tyranny must be perpetuated. But unanimity cannot be reached, for an obvious reason. The great mass of this Body-politic have no wills to decide. Children, idiots and lunatics cannot decide. Women, in most countries, are excluded from a voice in the decision. The determinate body in all such cases which history records is composed of not more than one-fifth of the whole number of society. What then shall be done?

1. Rousseau, confronted with this difficulty, evades it when

¹ *Ante*, § 4.

he says: "The choice by a plurality of votes is itself the result of convention," and supposes that unanimity must at least for once have subsisted between them.¹ He assumes *ex hypothesi* that the special compact was, at some unknown period, adopted with unanimity, and that by its terms future action was to be decided by a plurality. But how does this prehistoric compact bind the living generation, and how can a living minority be jurally bound by a majority under an hypothetical compact they never agreed to, made by an ancestry at a period whereof history makes no record? Thus, to maintain his theory, he resorts to an hypothesis of an event which never happened, and which, if it had, would, on his own principle of needed consent by all, have no obligation upon a living generation who dissented from it. This difficult problem is insoluble upon any theory of compact. Political science is a practical science, not a theory. It formulates this postulate: the *de facto* Body-politic and the *de facto* government must be assumed to be *de jure*, not because it is upon any original theory, but as an initial point — as the origin of political action — because the alternative would be political anarchy and social chaos.

If it is objected that neither the *de facto* government, nor the *de facto* Body-politic, is *de jure*, the answer is, can you establish any government or Body-politic which is *de jure*? If the *de facto* be void because without your consent, will that which you substitute be valid without the consent of all; and how can you hope for this universal consent?

Hence reason *ex necessitate* sanctions the above postulate. All revolutions or reformations in government have their start with the *de facto* government, or have, by usurpation and force, created a *de facto* government and Body-politic as the initial point for its reformation or revolution.

The English Revolution of the seventeenth century, the American Revolution of 1776; the French Revolutions in 1789, 1848 and 1870, have started with the assumption of the

¹Social Compact, Bk. I, ch. 6.

de facto order of things as *de jure* in order to the accomplishment of their reform or revolution.

If the objector still asks, is then a *de facto* government unchangeable—must mankind submit eternally to its domination? the answer is clearly, no. The *de facto* government may be used as an instrument for the proposed reform, or even for the proposed revolution, as an initial point, but not as the terminal, because the alternative to its acceptance as such is chaotic anarchy—social disintegration—political death. The satisfactory reasons for this conclusion may now be stated:

First. The Body-politic was not framed by man or under human compact. It grew and was not made; it grew under the ordaining providence of God. Its existence was by Divine order, not by human consent.

Second. Man in his highest condition cannot live out of society; his social status is his supreme right. His social liberty can only exist for him as a social being, and hence this liberty ceases when his social status ends. To assert this liberty for him by destroying that status, is to seek to secure such an equality for his liberty when the substance to which it belongs is gone. Anything to avoid anarchy, therefore, is a primary and essential security to his liberty; for liberty dies with the extinction of society.

Third. But to the objector who reasons for an *a priori* theory of natural right, the answer is easy. To reach some practical result, Rousseau's violent hypothesis is that the right of a majority to control was a term in the original contract of society; while, on the contrary, we insist that the *de facto* Body-politic has, by long acquiescence, been sanctioned by all, and may well, therefore, be deemed a *de jure* Body-politic by universal acquiescence, if not by universal consent.

Fourth. Politics is a practical science, not a mathematical one. The interests involved are not abstract, but personal. No theorem in this science can be true which would wreck society, transform it into chaos, in order to secure the social liberty of the man. If the *de jure* order is insisted on, we

must first determine what it is. The answer will be found in a babel of confusion of tongues. Therefore, in an impossibility of consensus as to what is *de jure*, what recourse have we but to assume as *de jure* what for generations has been acquiesced in by a whole people? In order to reconstruct the ship of state, it is madness to blow it up in mid-ocean. We must use it in order to repair it. This is true wisdom, and therefore is a sound canon of Political Science. While, on the contrary, it is folly to call that science which wisdom condemns and reason repudiates, because it destroys what it proposes to save and reform. If we cannot have a *de jure* initial point by common consent, we can reject that which is the nearest approach to it, that is, the government and social status which for generations has been acquiesced in by the people who proposed to deal with it.

§ 44. Let us now see to what uses we can adapt the *de facto* government in the reform and reconstruction we propose in our social policy. It is obvious that complaint of the workings of any *de facto* system will not often come from those who wield its power and enjoy its benefits. It is not probable that the tyrant will confess his sins and aim to overthrow his power or to reform his administration, nor is it usual that the parasites of the existing order—the recipients of its patronage—the pensioners on its bounty—the armed force which has no thought but loyalty to its leader—or the classes whose peculiar privileges are dependent on the *de facto* system, would readily take part in a movement fatal to their selfish interests.

But the power of public opinion—the clamor of an angry population—the sense of justice even with those interested to resist reform, and the threats of violence as a measure to enforce the proposed changes, have in modern times prevailed to wrest power from the hands that abuse it, and restore liberty to an oppressed people in all parts of the civilized earth; and, as already intimated, these results have come through the agency of the *de facto* power whose authority was to be overturned or reformed. Through the

regular Parliament of England from 1641 to 1666, through the French Assembly of States regularly called in 1789, two kings lost their heads, kingly power was overturned; and through the Parliament of England in 1832, the reform bill of 1832 was passed revolutionizing the government of England with the active agency of William IV.

If the *de facto* government refused to aid the reforms which the Body-politic imperatively demanded, shall the latter still submit to the perpetuation of the tyrant? Clearly not; the right of forcible revolution is always the reserved right of an oppressed people against any government. But if the *de facto* government yields to the popular demand so far as to aid the reforms which are proposed, what can it do in order that this Body-politic may act in the consummation of its purpose? As a practical problem its solution has been found in getting the *de facto* government to furnish the legal and regular method through which the Body-politic may utter its voice.

§ 45. It is at this point we find the advantage which is derived from long historic struggle of the people with despotism. Century by century, generation by generation, year by year, liberty makes its continual claim, and concession after concession is yielded to popular demand, until popular power at each step increases its hold upon the *de facto* government, until it is ready to yield again and again. Power, because of this position, possesses the vantage ground of liberty, for it may reply to every demand of liberty, "Take what I am willing to concede, but social chaos is the alternative." Liberty has generally shrunk from the alternative and accepted the involuntary concession. Hereafter we shall see how, by gradual advance, but by persistent purpose, our own great race has risen from slavery to freedom, and how others, rather than brave the terrors of revolution and social convulsion, have, in hopeless submission, purchased peace and order of despotism by a loss of liberty.

§ 46. It seems strange at first that the tyranny of one or a few can so long suppress the liberty of the mass, but a

few considerations will solve the mystery and make it more strange that liberty should ever succeed against established despotism. The views presented in § 39 will explain why the spirit of liberty among various races of men has been so inactive and dormant. History proves that power never voluntarily relaxes its hold, and only yields to popular will when by sturdy and persistent demand it compels the recognition of the right of the people. The causes which have stimulated the people to this attitude of resistance have arisen, as we shall see, from race characteristics and from the peculiar education of some particular nations.

On the other hand, the agencies of despotism are ancient, organic and formidable. The sentiment of submission to long-accustomed authority is almost a superstition out of which were evolved the heresy of the Filmer school. There is a divinity that doth hedge a king so that whatever is, seems right; but besides this prescription in favor of *de facto* power and the revolting alternative of forcible revolution, there are many moral and material methods by which power perpetuates itself against the protests of freedom.

The first of these is patronage, through which society itself is divided into two classes, the one of which is constituted of officials who, being supported by the government, rally to its support themselves, their kindred and friends. Then there are parasitical interests, privileged monopolies and the like, which, being fed by the bounty of the government, lend it their support and that of their retainers. The nobility established castes and classes, and all the people who depend on them, being in the same case with the government, may also be relied on to uphold it. These various dependents, with all their several dependents, ramify society, and make the protégés of power a band of faithful adherents to conserve the existing status against the hostility of the mass of the people. Society is thus separated into benefit-receivers and burden-bearers — privileged and unprivileged orders — tax-consumers and tax-payers, and though the mass may be more numerous, the dependents on govern-

ment are sufficient in number, influence and wealth to counteract in a large degree the tendency of revolution and reform by the mass. Another and more fearful instrument of despotism is a standing armed force, which, organized to and habituated to the discipline of obedience to authority, are the reliable defenders of power against the unorganized forces of rebellion. It is obvious that the *de facto* government, thus defended and upheld, will not easily be made a medium for reforms which will disturb the status of the privileged classes and their interests. They use the government for their benefit, faithfully oppose for it and themselves the intrusive interference of malcontents with a system eminently satisfactory to those who feed upon it, though adverse to the interests of the people who bear its burdens and reap none of its benefits. Reform will be a slow growth in the face of such a despotism.

§ 47. But despite hinderances, governments *de facto* have been efficient in aiding substantial reforms which divested them of authority and placed it in hands hostile to their traditional policy. In two instances in the last century, revolutionary reforms have been consummated through the agency of governments, whose natural attitude of hostility to them would have made their action seemingly impossible.

In 1789 the oppressed people of France clamored for an assembly of the states for radical reform in its policy. The Crown, in acquiescence with other orders, called them to Paris. The *tiers-état* forced the battle with the established order of nobles and clergy and formed that famous assembly which upheaved the monarchy, leveled the social order to an unheard-of extent, and shook every throne in Europe by its audacious challenge of all existent authority, and by its universal proclamation of liberty, equality and fraternity. The government *de facto* called the body into deliberation whose edicts established a democracy on the ruins of the most despotic monarchy in Europe.

The Parliament of Great Britain, in 1832, with the aid of William IV., operating on the reluctance of the House of

Lords, passed the great reform bill which revolutionized the government and gave dominion and permanent influence to the Commons in the future direction of British affairs.

Without adverting to the English Revolution of the seventeenth century, or to the American Revolution of the eighteenth century, it may be taken as true, that popular movements for reform will be heard and headed by *de facto* governments, and that through their instrumentality changes may be consummated in the interest of free institutions.

§ 48. The *de facto* government in all these instances acts instrumentally in furnishing the legal sanction to the organism through which the Body-politic may work a change in the structure of the government and in limitation of its powers. Minor reforms may be effected by ordinary legislation under the influence of public sentiment, but the most important and efficient activity of the *de facto* government in political reform lies in creating the organ through which the will of the Body-politic itself may be made known. The fundamental work of the Body-politic is to construct the government—to define its powers, to distribute them between departments, and to shield individual right from any jural power. This is constitution making; the Body-politic is the constructor. How is this to be done?

We have seen that the Body-politic is composed of all the men, women and children of the state. It is impractical for all of these to act. Children and imbeciles, by natural incapacity, partial and complete, are obviously incompetent to take part in this great work. For reasons unnecessary now to be considered, women have been excluded in most nations from participation in public affairs. How, then, shall the Body-politic act? This question can only be taken by assuming the Body-politic *de facto* as the legitimate Body-politic, or we may call it the representative Body-politic. To admit, upon any theory, the Body-politic *de facto* into any proposed Body-politic *de jure*, would end in confusion. Who, besides those actually admitted into the *de facto* Body-politic, should be introduced under your theory? What

portion of the excluded classes ought to be included? What hope of *communis consensus* on any proposed change? In the absence of any possible consensus, we are driven by analogy to reasons already adopted in respect to the *de facto* government, to take *ex hypothesi* the Body-politic *de facto* as the Body-politic *de jure*. The alternative to this assumption is anarchy. We may then assume that, while the Body-politic *de jure* is composed of all men, women and children in society, the *de facto* Body-politic will be composed only of those admitted to suffrage under the existing order of things. The first is the real Body-politic; the last the representative Body-politic; and this last is in substance the *πλῆθος πολιτῶν* of Aristotle — the mass of citizen voters.

We are in a dilemma between accepting the *de facto* Body-politic as legitimate, or, by its rejection, plunging into social chaos and political anarchy. The acceptance of the *de facto* Body-politic is conservative of social order and hopeful of political reform; the rejection of it, upon a theory of what ought to be the Body-politic *de jure*, is like dynamite — it destroys social bonds and wrecks hope of political reform.

§ 49. Nor is the acceptance of the *de facto* Body-politic as *ex hypothesi de jure* open to serious objection when closely examined. The representative voter in the *de facto* Body-politic, where suffrage is universal, is really the head of the family. The Body-politic is not a collection of individuals, but an aggregation of families, of which the chiefs are the representatives. No great evil can result to the family by being excluded from personal participation in public affairs, when they, as collective individuals, are represented by their chief. The *patria potestas* of archaic society thus comes into play as a constituent factor of this representative Body-politic. In Great Britain the voters are about one-tenth of the population; in the United States about one-fifth; and where suffrage is universal it may be assumed that the *paterfamilias* wielding the *patria potestas*, is a representative of an average of himself, wife and three children, the material constituents of the Body-politic *de facto*. Thus it will be

seen that the *de facto* Body-politic is substantially representative, and that as each suffragan intelligently voices the will, rights and interests of his own family, no essential wrong can be done, and the true representative of right of all may be held as embodied in this *de facto* Body-politic.

§ 50. In considering the powers of this representative Body-politic of the real Body-politic of all men, women and children organized in social union, our definition has shown that all rightful political power has been vested by the Divine Being in trust to promote social order and civil liberty for all its members. The powers thus vested in this Body-politic are not autocratic but in trust—not absolute but limited to the purposes for which they were delegated, which trust involves protection of the inalienable rights of every member of the Body-politic and can never be used *de jure* for the impairment or destruction of them. This jural political power representative of the Body-politic is what we call sovereignty, but is neither absolute nor autocratic, but is delegated by the Supreme Being and limited by the reserved rights of individuals, which are inalienable by the man himself, and indefeasible by any other man or any body of men.

This view of the authority of the Body-politic shows that man has certain rights which are beyond the reach of the power of any government or of any Body-politic. This Divine agency ordained to protect this God-given right cannot have Divine authority to assail and destroy them, and this limitation upon the real Body-politic for a stronger reason is applicable to the representative Body-politic, so that the duty of the representative Body-politic is so to use its sovereignty, thus limited in power, as to promote the maximum of good to every member of the Body-politic—that is, the largest social liberty to every human being—the greatest good to each—consistent with the greatest good to all, and not to achieve the greatest good to the greatest number.

§ 51. In thus conserving the functional agency of the *de facto* government and the *de facto* Body-politic for the

reform of political institutions as the only alternative to social chaos or violent revolution, we do not mean to deny, but really to affirm, the right of revolution in the Body-politic against all established systems of government. The right and duty of men are superior to any claim by prescription of government. We have endeavored to show that in every mode in which reform may be admitted, whether by peaceable or forcible revolution, we cannot best protect the action on any *de jure* principle, but must resort to the use of the existing *de facto* order to accomplish our purpose, or we shall be driven in violent action to an assumption or usurpation of initial authority as *de facto* legitimate to achieve like results. No political authority can be adapted to the solution of this political problem. We may approximate, but cannot hope to reach the *de jure*. To approach the jural, in our legal and revolutionary methods, is all that can be hoped for. Political science is a practical science, not a mere theory. We must aspire to the jural, and, while never attained, yet it is sufficiently so, when, as nearly as possible, it is conformed to the jural sovereignty of the real Body-politic in dealing with the rights and liberties of the individual man. The most solemn trust which can be devolved on man is the duty of constitution-making confided to the representative Body-politic; the highest honor which man can merit is in the successful discharge of that duty; and the greatest crime he can commit is in treason to this trust in the usurpation or abuse of his powers in constituting the government and in the definition and limitation of its authority.

CHAPTER II.

SOURCE OF SOVEREIGNTY AND POWER.

§ 52. We have heretofore established as the legitimate result of practical political science that it is best and safest to clothe the representative Body-politic with the sovereignty vested in the real Body-politic, and with authority to change the old and construct a new civil polity, that sovereignty being limited, as has been indicated previously,¹ so as to secure the rights and liberty of the individual man, and not to trench upon his inalienable and indefeasible rights, which are not rightful within the sovereignty of the Body-politic. As we have seen, this representative Body-politic, called by Aristotle *πλήθος πολιτῶν* — the mass of suffragans,— and in a country where suffrage is moderately restricted or universal, this *de facto* or representative Body-politic may be regarded as a federation of families, each chief of which casts the vote of the family,— that is, we find in this a return to the *patria potestas* of primitive society in this representative Body-politic. As the *de jure* Body-politic is in theory the rightful sovereignty and principal, and government but its agent, this representative or *de facto* Body-politic in practice must be taken to be that sovereign power which creates government by making a constitution for it, delegating its powers, and distributing them between departments at its pleasure. The authority of this Body-politic may be regarded as the combined powers of all the individuals composing it, vested in each by its Creator to enable them, in social union with secured liberty of self-use, to do their several duties to him. In the language of Bluntschli, “Each (man) is at the same time member of the sovereign and subject to the sovereign.”² The organic force of society — the government — must be so

¹ *Ante*, § 26.

² *Theory of the State*, p. 498, note.

considered, its powers so defined and limited, and its machinery so arranged as to conserve the rights and liberty of the man and to promote the social welfare of the whole. This enormous machine must *ex necessitate* be wielded by human hands and guided by human beings, in whom the selfish principle always threatens injustice and wrong to the subject of its power. Upon governments, therefore, wisdom and experience dictate there should be such restraints as to their possible usurpation and abuse of power, as well as such definition and limit to the exercise of their functions, as will secure the liberty they are Divinely ordained to secure. The device by which these important objects may be obtained we call a constitution (*con* and *sto*, to stand together).

God has not ordained any form of government, though he has ordained government itself, thus providentially indicating that the form which the constitution shall give to government is left to the sagacity of each people to fit and adapt to its condition. The form fitted for one people is not adapted to all, and, therefore, the constitution which the Body-politic should adopt for one people may properly be very different from that which should be adopted for another.

What society must secure to the man is the maximum of social liberty to each, consistent with the like liberty to all others. He must be left as free as possible, so that his freedom shall not detract from the equal social liberty of his fellows. It follows from this, that where man is controlled by moral force within him, which makes him respect the social liberty of others, government in so far is not needed to control him; but where he is licentious and not self-governed, government is needed to curb his action, which he will not himself restrain.

For if we suppose the sum of force needful for the control of any man to be fixed, it will consist of two factors: the internal and external. The internal, or moral, force is that which he himself exercises in directing his action; the external force is that which the government must exercise

where self-control is not sufficient properly to regulate his action. As man rises in the scale of moral intelligence, he becomes the better able in freedom to control himself. As he falls in that scale, his capability of proper free use decreases and external control is needed properly to regulate his conduct. When, therefore, the moral force becomes equal to the entire force needful for his control, governmental force may be zero; but when the moral force is zero, the governmental force must be all. This may be well illustrated by the formula: $F = M + G$; where F represents the total force needed for control, M the moral force, and G the external force. This formula shows that where M is equal to F , G may be nothing; but where M is zero, G must equal the entire force. From the above we deduce the following maxim: Give to man the maximum of liberty and to government the minimum of power consistent with conservation of social peace and order.

The degree of liberty for which peoples are fitted is therefore very different, and liberty is a prize which God holds out as a reward of moral elevation, because it alone can make the highest liberty consistent with the social order of the people. Free institutions are therefore the achievements of a people through a civilization in which personal self-control makes freedom possible without imperiling social order.

Barbarians cannot hold free institutions when given to them, because the forces essential to maintain social order over savage natures would destroy freedom. The supremacy of moral force in the heart of the individual man is essential to his freedom over the external control of government. If man will control himself by self-government, he may be free; if he will not, government must limit his freedom by such power as is needed to keep him in order.

To sum up: God ordains society for man and ordains government for society, and leaves to man's wisdom his noblest function, the construction of a constitution for the government. As society is ordained for man-right, and government is ordained for social order, so the constitution must

be ordained to control government in order that it may protect individuals and preserve society. A constitution may be defined as any ordination by the Body-politic which constructs the government for the state and prescribes and defines its powers. It may be institutional, an outgrowth of institutions, or a written instrument. It is the act by which the Body-politic constitutes the government and delegates and limits its powers. The Body-politic holds the sovereignty and gives powers to government. The Body-politic is creator: the government its creature; the Body-politic is principal: the government its agent; the Body-politic is master: government its servant; the Body-politic is a band of *cestui que trustent* for which government is trustee; the Body-politic is the *de jure* sovereign: the representative Body-politic is the *de facto* sovereign. The government, as agent, derives all the authority it has, for it has no original authority, directly from the real Body-politic, though indirectly from the representative Body-politic. The Body-politic is sovereignty with original powers; government is not sovereignty, for it has no original powers, but only those derived from its sovereign. The Body-politic is the primary "powers that be ordained of God" to create and control government, which is only the secondary "powers that be ordained of God."

§ 53. Sovereignty is the essence of power from which flow emanations of powers. Sovereignty is the dynamo — the motor force in all civilized polity. Its emanations in the exercise of powers by its agents are distinct from it — do not decrease it, but leave it in its normal status. We must not confuse this essence of power with its emanations.¹ Sovereignty, as essence, is one, indivisible, ungrantable, undistributable and always reserved; governmental powers, as emanations of this essence, may be granted, distributed, divided or reserved. This important distinction between sovereignty and governmental powers — the one as the essence, the other as emanations therefrom — will not find recognition in British writers

¹ Rousseau's Social Compact, Bk. 2, ch. 2.

prior to the seventeenth century, or in such as Blackstone in the last century. Thus Blackstone says:¹ "By the sovereign power . . . is meant the making of laws." This doctrine is equivalent to the English maxim that the British Parliament is omnipotent; but a learned commentator, while denying this dogma of Blackstone, has held, in distinct language, that the legislative powers are no more than emanations from the sovereignty, where, and *where only*, that legislative essence which constitutes sovereignty can be found.² The same commentator adds: "The power which every independent state or nation . . . possesses in relation to its own immediate concerns is unlimited, and unlimitable, so long as the nation or state retains its independence; there being no power upon earth, whilst that remains, which can control or direct the operations, or will, of the state in those respects. This unlimitable power is that supreme, irresistible, absolute, uncontrollable authority, which by political writers in general is denominated the *sovereignty*; and which is by most of them supposed to be vested in the government or administrative authority of the state, but which, we contend, resides only in the people, is inherent in them and unalienable from them."³

"Power in the *people* is like light in the sun, native, original, inherent, and unlimited by anything human. In government it may be compared to the reflected light of the moon, for it is only borrowed, delegated and limited by the intention of the people, whose it is, and to whom governors are to consider themselves as responsible, while the people are responsible only to God; themselves being the losers, if they pursue a false scheme of politics."⁴

That the ultimate supreme power is in the people is also the doctrine of Locke.⁵ The same doctrines are announced in the Bills of Rights of Virginia, Massachusetts, and the

¹ Vol. 1, p. 49, Lewis' Edition.

⁴ Burgh's Political Disquisitions,

² 1 Tucker's Blackstone, Appen., vol. 1, Bk. 1, ch. 2.

pp. 5, 6.

⁵ Civil Government, ch. 13, p. 261.

³ Id., pp. 8, 9.

others of the original states of our Union. This may be regarded as specially American doctrine, very little comprehended by any of the European writers. Even Bluntschli, in quoting Washington's farewell address, in which he says: The basis of our political systems "is the right of the people to make and alter their constitutions of government," seems to take but a confused idea of it while he admits it. Later English writers, many on the continent, while in the main conceding the truth of the doctrine, do not seem to understand it in the mode in which it has been already set forth.

Mr. Justice Matthews, in the case of *Yick Wo v. Hopkins*,¹ states the doctrine clearly thus: "Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of the government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."

It follows from this relation between the Body-politic in its constitution-making power and the government in the ordinary exercise of political powers — the first holding original authority, and the latter only derivative — that when government exercises powers which the constitution allows, its action has the full force of the sovereign will; but when the government does what the constitution does not allow, the action of the government is *ultra vires* and void. This is the great American discovery in political science. It may be stated thus, as a political axiom in America, that the constitution is supreme and paramount to all acts of all departments of government; and that any such act repugnant to, or inconsistent with, the constitution is null and void, and by the court shall be held of no force or effect. The supremacy of the constitution-making power over all acts of government, whether legislative, judicial or executive, lies at the foundation of our political law, and is, in its full force, the great American discovery in the science of government.

¹118 U. S. 356-370.

The authority to make constitutions is in the Body-politic. The Body-politic utters its sovereign will through the constitution which calls government into being, organizes its functions, defines and limits its powers, and declares to this, its creature, by its creative fiat, "thus far shalt thou go, but no farther." This principle rejects wholly the idea that any government is Divinely entitled to servile obedience, or to any obedience where it violates the law of its creation or sets at naught the charter of its authority. An aristocracy or democracy which obeys not a constitution, under which it derives and exercises power, so far from having claim to be *jus divinum* or supreme as the "powers that be," is a usurper of the fundamental authority of the people, which is the true *jus divinum*, because it has primary and fundamental powers that are ordained of God. The author of *Paradise Lost*, in his memorable defense of the people of England, has vindicated the doctrine thus stated, which has become an axiom in American politics. This doctrine may be found germinally hinted at in the writings of Aristotle, and though the translations of this great Greek philosopher somewhat differ, yet it seems to be well defined by him that there is and should be permanent and paramount laws, the supremacy of which there is no power to oppose.¹

In *Magna Carta*, June 15, 1215, page 61, the paramount authority of this great charter is expressed in these terms:

"Et nos nihil impetrabimus ab aliquo, per nos nec per alium, per quod aliqua istarum concessionum et libertatum revocetur vel minuat; et, si aliquid tale impetratum fuerit, irritum sit et inane et numquam eo utemur per nos nec per alium."

The practical inefficiency of this declaration of the Great Charter, owing to the dogma of the omnipotence of Parliament, made the declaration rather abstract than practical; but in some early cases of the Courts of the States, notably in *Hawkins v. Kamper*,² in Virginia, and in other cases in other states, the doctrine was judicially established in its application to the paramount authority of state constitutions.

¹ Aristotle's Politics, Bk. 4, ch. 4, ² 1 Virginia Cases, 20.
and Bk. 3, ch. 2.

But in the great case of *Marbury v. Madison*,¹ the doctrine is stated with so much clearness and force by Chief Justice Marshall, speaking for the Supreme Court, that a full citation of the language of that decision may properly here be made:

“That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designated to be permanent.

“This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

“The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between governments with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

“Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

¹ 1 Cranch, 391 [176-178].

"If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

"This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

"If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

"So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legis-

lature, the constitution, and not such ordinary act, must govern the case to which they both apply.

“Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

“This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet in practice completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure.

“That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.”

§ 54. This principle, the supremacy of the Body-politic as constitution-maker and the subordination of the government as the delegated agent of the Body-politic, with no powers but those derived from the Body-politic by virtue of the constitution, is therefore the foundation of American Constitutional Law. All acts of every department of government, within the constitutional bounds of powers, are valid; all beyond bounds are “*irritum et inane*” — null and void. Government, therefore, has no inherent authority, but only such as is delegated to it by its sovereign principal. Government may transcend the limits of this authority, but its act is none the less void. It cannot, by usurpation, jurally enlarge its powers, nor by construction stretch them beyond

the prescribed limits. The idea that usurpation or necessity or a supposed extension as the consequence of custom or progress of society can make jural any power not constitutionally conferred is contrary to American political science, fatal to the liberties of the people, and is only a wicked pretext for the violation of sworn obligations. Such an idea would really mean this—that persistent usurpations of power by a government, acting under the prescribed limitations of a written constitution, could amend and change that constitution, which by its terms can only be amended and changed by the Body-politic itself. It would make the government a self-creator of its own powers, instead of the creation of the Body-politic with only delegated powers. It would take sovereignty from the people and vest it in their government; and transfer all political authority by flagrant usurpation from the Body-politic to the omnipotent government. Written constitutions would be destroyed, and the self-usurped omnipotence of irresponsible government would be erected upon their ruins.

§ 55. The constitution may be written, or institutional and unwritten. A Body-politic by institutional methods may organize government and define the limits of its authority. Thus, customs and precedents have great authority, and these without reference to any written instrument whatever. In England its constitution is largely a structure founded on precedents and customs, and yet there are great papers to which reference is always made as of great and permanent authority. Thus Magna Carta, as we have seen, confirmed in many reigns, has been the embodiment of free institutions, a departure from which meets public condemnation, and whose very terms, as we have shown, make whatsoever is contrary thereto void and of none effect. In the reign of Charles I., the Petition of Right by the House of Commons, sanctioned by the King, was a *quasi*-constitutional compact between the King and the people as to the true line between prerogative and popular power; and in 1688 the Declaration of Rights presented to the Prince and Princess of Orange

became, by the act of 1 William and Mary, the embodiment of the principles upon which constitutional monarchy ever since has been founded.¹ For this reason Mr. Gladstone has well said that “the British *constitution is the most subtle organism which has proceeded from progressive history*”—it is an institutional constitution, though not written. Such a constitution, whose provisions are to be derived from the changing precedents of six centuries of historic progress, must be radically defective; for as these precedents are made by the delegated authority of Parliament, it results that the government may augment its own powers at will, and thus usurp the omnipotency which should only belong to the Body-politic—the people.

In these American states the history and usage for more than a century has settled that the structure of government and the definition of its powers by the Body-politic should be prescribed in a written constitution, leaving no honest pretext for transcending the bounds fixed thereby, in the uncertainty of near historic precedents and customs. Sworn to obey that written constitution, the officer who violates it must stand convicted of a perjured usurpation of authority.

§ 56. In this country the early practice was that the Body-politic should, through its representatives in a convention elected by the voters, adopt a constitution and nothing more.

The question as to the right of suffrage in the election of this convention, the number of its members, how representation should be distributed among the people, when and how the election is to be held, when and where the convention is to meet, have been determined by an *instrumental*, not an *enabling*, act passed by the *de facto* legislature of the Body-politic. This use of the *de facto* government is, according to the views already set forth, a necessary expedient to avoid the alternative of chaotic confusion and social anarchy; for how could the Body-politic, composed of all the men, women and children in society, settle these practical questions themselves. A resort to the existing order of

¹ See Stubbs, *Selected Charters*, Appen., p. 523.

things is, therefore, inevitable, if action is to be obtained without social disintegration. But it must be well understood that the instrumental act of the *de facto* government is simply a medium through which the potential sovereign, the Body-politic, may utter its authoritative voice. The convention, when met, is the incorporate representative of the real Body-politic, the sovereign people.

When the convention frames a constitution, as that is its only charge, it is *functus officio*. Whether its consummated work shall be submitted to a vote of the people, and if so, what shall be the basis of suffrage, and what vote shall be necessary to give it final effect, are questions as to which there has been no settled canon in our political science and no uniformity of custom.

It may be stated, however, as a fact, that all the constitutions of the original states were ordained by convention, without a submission of the constitution so framed to a popular vote for ratification. The deliberative act of the representatives elected by the Body-politic was thought to have the sanction of the latter without a subsequent vote. And this was unquestionably the general view of all the states when, in the Federal Convention which composed the constitution in 1787, their consummate act was submitted for ratification to each state through its separate convention, without any subsequent sanction by the popular vote of its people. The amendments to the Constitution of the United States are to be adopted by the Legislatures or Conventions of the several states, without the necessity of submission to a popular vote.¹

During the last half century or more it has been the usual practice for the convention to frame the constitution and then submit it to a popular vote for final ratification; but this practice has had exceptions, and it may be safely stated that the validity of a constitution will not be held to depend upon its final ratification by popular vote.

The practice in Virginia may be mentioned as an example.

¹ Const. U. S., Art. 5.

The first constitution of Virginia, drawn by George Mason, was adopted in convention of the State on the 29th day of June, 1776, which was not ratified by popular vote. It was judicially held to be valid in *Kemper v. Hawkins*,¹ and continued in full operation until the Constitution of 1830 was adopted. In that year a convention was called by legislative act to amend the constitution, and it decided to submit the constitution it proposed to the voters entitled to suffrage under the proposed constitution, which greatly enlarged suffrage beyond what had been allowed under the Constitution of 1776. It was ratified by that popular vote. The Constitution of 1850 was adopted in convention and submitted to a popular vote for ratification. The Constitution of 1870 was adopted in convention and ratified by popular vote, but, by its twelfth article, amendments thereto may be proposed in the Senate and House of Delegates, and if agreed to by the majority of the General Assembly next chosen, shall then be submitted to the people for ratification, and upon such ratification shall become a part of the Constitution.

The practice in other states need not be especially adverted to, except that recently the State of Mississippi adopted a constitution in convention, which was established by the act of the convention without a submission of it to the vote of the people.² Whether such a constitution so established shall be held to be the constitution of the state, without the ratification by popular vote, has been questioned. All doubt of its validity would seem to be settled by the fact that the Constitution of the United States is held to be binding upon each of the states of the Union, though it was ratified by a convention of the people of each state, and not by any submission to popular vote. If, therefore, a constitution of a state should be held invalid because not ratified by popular

¹ 1 Virginia Cases, 20.

² During the year 1898 Louisiana also adopted a new constitution, without submitting it to the people. The validity of the Constitution of

the State of Mississippi was affirmed in the case of *Williams v. Mississippi*, 170 U. S. 213, but it seems that the question under discussion was not raised in the case.

vote, it would raise a doubt as to the validity of the Constitution of the United States, which was ratified by conventions without submission to a popular vote.

§ 57. In case of submission to popular vote for ratification, a question may arise whether it may be ratified by a majority vote, or whether some other larger vote should be required. This question will be considered more fully under another head hereafter, but it may here be said that, ordinarily, in any state where the interests of the people are not radically antagonistic, but are harmonious — where the population is homogeneous, not heterogeneous — a numerical majority of the people may be safe. As has been said, the majority has no natural and jural right to control the minority; for when two antagonistic interests exist in a state, to give the control to that which has a majority of votes would give to that the right to destroy the other for its own benefit. Ordinarily, however, the mere diversity of interests will not make ratification by a majority vote a serious, much less a radical, evil; for as a constitution is a permanent system, regulating general and not special interests, the voters will act rather with a view to a permanent protection of their interests for all time, than for the promotion of any one of them by a mere temporary advantage.

But the propriety of regarding the diverse interests involved in the adoption of a constitution has been signally illustrated in the history of our Federal Constitution. That was to be a compact between thirteen separate states. Each was required to separately ratify it in order to be bound by it.¹ None could be bound but by its own ratification. The numerical majority of the states taken as a whole could bind no single state, unless a majority of its convention ratified it. This instituted the concurrent majority of many instead of the numerical majority of the whole. So also amendments to the Constitution of the United States depend on the concurrent majorities of the many (three-fourths of the states), and not on any majority of the whole,

¹ Const. U. S., Art. 6.

and on one point the equipollency of the state representation in the Senate cannot be taken away without the consent of the state affected thereby, though the unanimity of all the other states were secured.¹

§ 58. The representative Body-politic so assembled in convention for the formation of the Constitution is, as we have seen, charged with a delegated duty from the real Body-politic, so to organize the government, to prescribe and limit its powers, as to conserve the liberty of the individuals composing it. In a proper sense it may be considered to be a method by which the individuals of a state make an agreement to be bound by this representative act as that of the sovereignty of the Body-politic. In other words, we reach here, if ever, the domain of social compact, not as originating society, or as pre-existent to it, but as the act of already existing society, laying the foundation and raising the superstructure of the government, the organic social force, upon principles agreed upon as just in such manner as approximately, if not completely, to gain the universal consent of the real Body-politic. It is, as has been said already, the solemn and imperative duty of this Body-politic, representative as it is of the real Body-politic, to conform its action to the conservation of the liberties and interests of the people.

For it must never be forgotten that as the actual consent of all is impracticable, for reasons already assigned, the work of constitution-making by convention of the representative Body-politic, being a delegated trust, must be performed under a solemn sense of responsibility for its just discharge; not to obtain advantage for any portion of society at the expense of others, but to accomplish the end of all social polity in promoting the welfare of each and all, and in protecting the liberty and right of each individual to the maximum of good consistent with social peace and order. A notable example of this work at this stage of organization is presented in the Federal Union of Commonwealths established on this Continent in 1789.

¹ Const. U. S., Art. 5.

As will be shown hereafter, thirteen free, sovereign and independent states made a compact resting upon the consent of each expressed in the convention of the people of each of them; and thus, by the terms of the Constitution itself, established it "between the states so ratifying the same."¹ It was thus not a social compact, but an interstate compact, with the free and separate consent of each by its own convention; not by the consent of all the inhabitants of the thirteen states, nor by the consent of all the inhabitants of each state, but by the distinct organic consent of the convention of each as a separate Body-politic, thus constituting the Union — a multiple of these bodies-politic, for the common purposes defined by the terms of the written compact. It is a federal compact of states, not a social compact of men; a federation of which states are the units, not a social compact of which men are the units; it is a constitution based on the unanimous consent of the states as members to it, not on the universal consent of the individual men who are subject to its authority, but by the organic consent of the several states of which those men are representative citizens.

§ 59. In further consideration of this work of constitution making, it is the ultimate requirement of all political systems in modern times, and in a large sense in all eras, that the organic social force we call government must be vested with three classes of powers in order to make its organization efficient for the social state.² The first of these is the ordainment of rules for the civil conduct of men in their relation to each other, and of each to the state. These rules, which should be made to protect each in his liberty against all others, must prescribe what is right and forbid what is wrong, and are generically called laws. Law is the expression of the will of the organic social force (government) in order to conserve the peace of society and protect the liberty of its members. This is the supreme power in the state — the Body-politic acting through the legislative department of the government.

¹ Const. U. S., Art. 7.

² Aristotle, *Politics*, Bk. 6, ch. 14.

The second of these is that which applies the law so made to special cases, which arise from the inter-relations of men by contact and contract. It does not make law, but declares the law as applicable to each of such cases. This is the supreme power of the Body-politic, acting through the judicial department of government.

The third of these is that which brings before the judicial department the persons and things as to which contention has arisen for the maintenance of right against wrong; and which executes the mandate of the law as adjudged by the judicial department. These two functions are the supreme power of the Body-politic exercised through the executive department of government.

It is very obvious that as the executive and judicial departments make no rules and initiate no action against the right or liberty of the citizen, but are only means to enforce the law, which the legislative department puts upon him as to the mandate of the social force, the first, the legislative department, is the most vital and important in its influence on the liberty and the rights of men, and therefore should be organized by the constitution with great care so as to protect the liberty and right of the man against usurpation and abuse by the governmental power. We shall, therefore, in the next chapter, begin with a consideration of the proper organization and limitations on the powers of the legislative department of government.

CHAPTER III.

THE LIMIT OF GOVERNMENTAL POWER.

§ 60. The legislative department, being that which puts into effect rules upon civil conduct and restraints on individual liberty, its organism and the definition of its powers is of vital importance.¹ The government must have certain legislative powers which are essential to its being.

First. The protection of a people from foreign invasion, the support of its machinery for internal order, and the conduct of its rightful operations require means which must be supplied to it by the members of society. This makes taxation a proper power to be vested in it. The appropriation of the revenue from taxation must be left to the government. These two constitute what may be called its fiscal action. They belong rightfully to the legislative department. The citizen pays his taxes as lawful compensation for the protecting care he derives from the government. He bears the burdens for benefits received. His person and property are secured by government, and he pays the tax for this security.

Second. The rules for personal conduct in the relations of contact and contract between men must be prescribed by law. Men must so use their own liberty as not to trench on the equal liberty of others. Law must enforce this personal duty to insure personal peace and order. This liberty of self-use is by Divine title; it must be secured and only abridged so as to secure the like rights to all.

It has been fully established that government was Divinely ordained to conserve man-right and man-freedom to each and every member of society. The equality of right of each to his own powers and their use, and to the fruits of such use,

¹ Locke on Civil Government, §§ 149, 150.

is not a gift of society or government to him, but is the inalienable and indefeasible gift of God. No man can jurally take them from him, nor can the government itself, ordained to protect his title to them, divest him of them by any jural authority. For government to protect him in these essential liberties is duty; to take them from him without just recompense is robbery. It must defend his rights against the private robber, and commits public robbery by destroying his right, or by aiding any one to rob another of any of these essential rights. This canon as to personal freedom may therefore be stated: the maximum of liberty must be secured to each man consistently with the peace and order of society.

Third. This enormous power of government must be exerted with just regard to the equal rights of all the members of society. It is trustee for these and must use its power with equal justice to all. It must not help one and hurt another. Its power is granted by all for the equal benefit of all, and when that power so granted is used by government to help one or to hurt another, it is the abuse of the grant by using A's power to hurt himself, or to help B. Power is granted by the man to the government in trust for his own benefit; it is a flagrant breach of the trust to use it to his injury, or to pervert it to the use of another. All that the man can ask (and this he may demand) is that government shall use his power, delegated to it, for the conservation of his man-right. He cannot demand its aid, for that would be to use another's power to help him; but he can demand that government shall not obstruct his free self-use when thereby he injures nobody. Each must work out his own destiny, without help or hindrance from government, and without forcing aid or receiving hindrance from any other member of society.

There are two modes by which government has perverted its powers in the unequal use of them between members of society:

(a) Privilege (*priva lex*). When government gives help to one which it fails or refuses to give to another, it grants

to one the use of the power of the other to foster the interests of that one, when the power of the other has been delegated to his own use. It diverts from a common store of power, what the other contributed for his own benefit, to that of the one, and denies it to the creator of the power.

(b) Monopoly (*μόνος* and *πωλέω* — to sell). When government gives license to one to exercise his right, and denies it to others in the same position, this is monopoly.

Privilege gives government's favor to one which is denied to others. Monopoly allows one to exercise his right, which others are forbidden to exercise. Both are tyranny, for the trustee of power from all, to be used for the equal good of all, confers a favor on one which is denied to others, and destroys the right of one to secure an equality of right with every other. All are entitled to equal protection. Favors to all alike or to none; rights of each secured, with denial to none.

These three classes of legislative powers may cover the whole domain of authority to be entrusted to the legislative department. In order to illustrate these abstract propositions, judicial authority may be adduced. "It may well be doubted," said Chief Justice Marshall, in *Fletcher v. Peck*,¹ "whether the nature of society and government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted; but the question, whether the transferring of the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection. It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." And Chief Justice Chase adds, with great force: "And if the property of an individual cannot be transferred to the public, how much less to another individual?"²

¹ 6 Cranch, 135.

² Legal Tender Cases, 12 Wall. 581.

"It violates that fundamental principle of all just legislation, that the legislature shall not take the property of A and give it to B."¹

"No court, for instance," said the late Justice Miller, in *Loan Association v. Topeka*,² "would hesitate to declare void a statute which should enact . . . that the homestead now owned by A should no longer be his, but should henceforth be the property of B. . . ♦ Of all the powers conferred upon government, that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited." And then follow these weighty words: "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."

He then quotes the language of Judge Cooley: "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes."³

Judge Cooley says:⁴ "*Levies for Private Purposes.*—Where, however, a tax is avowedly laid for a private purpose, it is illegal and void. The following are illustrations of taxes for private purposes: A tax levied to aid private parties or corporations to establish themselves in business as manufacturers; a tax the proceeds of which are loaned out to individuals who have suffered from a great fire; a tax to supply with provisions and seed such farmers as have lost their crops; a tax to build a dam which, at discretion, is to be devoted to private purposes; a tax to refund moneys to individuals which they have paid to relieve themselves from an impending military draft; and so on. In any one of these

¹ Legal Tender Cases, 12 Wall. 580.

² 20 Wall. 663 and 664.

³ Cooley on Constitutional Limitations, 479. See also *Northern Liberties v. St. John's Church*, 13 Pa. St. 104, per Coulter, J.; also

Allen v. The Inhabitants of Jay, 60

Me. 124; *Jenkins v. Anderson*, 103

Mass. 74; *Lowell v. City of Boston*, 111 Mass. 454.

⁴ Constitutional Law, p. 58.

cases the public may be incidentally benefited, but the incidental benefit is only such as the public might receive from the industry and enterprise of individuals in their own affairs, and will not support exactions under the name of taxation."

In *Cole v. La Grange*,¹ Mr. Justice Gray, speaking for the whole court, said, referring to a number of cases:

"The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract for private objects debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

These citations are sufficient to sustain the views already presented. The important limitations upon legislative power, which restrain it from taking the property of an individual by taxation for any other than a public purpose, or from taking the property for a public use, except upon just compensation, are essential to the private right and liberty of every citizen. If government can be restricted in its action to what is needed for the protection of individual right, and from undertaking to select special interests for its fostering care at the expense of the mass of the people, there will be far less wrong done and the rights of men will be better conserved. The tendency of all systems, from the very nature of selfish man, is for private interests to aspire to get the government into their hands and to use it for their purposes. Private interests struggle for this. Public elections are not merely party struggles, in a mere race between rival candidates for place, they are the struggles

¹ 113 U. S. 6.

between representatives of interests, which are adherent to the man because he is their man and will do their bidding. He is their racer, upon whose success great stakes depend; his success is theirs.

The fiscal action of government, in its nature, cannot be equal. Some pay more into the treasury than they ever get out; others get out more than they put in. Hence the division of society into two classes—tax-payers and tax-consumers. The first are interested to lessen taxation, because it is a burden with no equivalent benefit. The second are interested to increase taxation, because it increases the benefit of large disbursements to them without equivalent burden. Therefore, the toiling masses are made to pay taxes on which the official few, and their parasites and banded interests, feed and fatten. The best government is not that which exacts large taxes and makes great expenditures, but the reverse. Light taxes and economy are cardinal objects of all good government. It is better to leave in the hands of the individual what would stimulate his private enterprise than to take it from him to pamper the parasites of the treasury. The contrary system may build palaces for rank, but will make squalid hovels for the poor.

§ 61. The two rival theories of government may therefore be described as follows: The polity of individualism and the polity of paternalism.

In the ancient world the system of paternalism was most prevalent, and, as a late writer has very strongly said, “the Hellenic State, like the ancient State in general, because it was considered all-powerful, actually possessed too much power. It was all in all. The citizen was nothing, except as a member of the State. His whole existence depended on and was subject to the State. . . . The independence of the family, home-life, education, even conjugal fidelity, were in no way secure from State interference; still less, of course, the private property of the citizens. The State meddled in everything, and knew neither moral nor legal limits

to its power. It disposed of the bodies, and even of the talents, of its members.”¹

The ideal republic of Plato was a system under which all individualism was merged in the State, and everything was regulated by it, as the parent of its citizens; and while he clearly held the governor should not consider his own good, but only the good of the government for whom he was steward,² yet he held that the State was created so that all might be happy to the fullest extent by the State giving happiness to everyone.

The history of this system of political thought repeated itself about two centuries ago in the *Patriarcha* of Sir Robert Filmer, the champion of the House of Stuart. In this work he maintained that, by derivative title from God through Adam, there had been transferred to the king the original *patria potestas* of the family, and that to this royal *patriarcha* absolute obedience was due by all, and to him were confided the care and training of his children — the men and women of the Nation. This was the *patriarcha* of the Stuarts, which had its first condemnation on the scaffold where Charles I. was beheaded, and in the abdication of the last of the Stuarts in 1688.

The paternal government, the *patriarcha*, is based on falsehood and is a political fraud. It takes the paternal name to sanction its absolute authority, but discards the paternal duty in administering government. A father in name, it is without his natural love to mitigate tyranny, or to do equal justice among its people. It claims unlimited power to dispense blessings or cursings at its will. It has petted parasites attached to itself, because they feed upon it, and it draws the resources with which to supply them from the disinherited mass of its children, whom it exhausts, but never helps. It has its foster children and its foundlings — its favorites and its victims — and burdens many for the benefit of the few.

¹ Bluntschli's Theory of the State, p. 37. ² Book 2, ch. 15.

But this monarchical *patriarcha* was a blessing compared with the paternalistic democracy. The former would have a favored few in its family, but the democratic *patriarcha* must, in order to retain its power, band the multitude in its support by profuse and extravagant largess. In a monarchy, those bounty-fed adherents for the price of their loyalty will be few, compared to the multitude whom no man can number, who will clamor for extravagance in expenditure as the reward for the support of the party which bids most for their favor.

When government advertises itself as the munificent almoner of indefinite charities, as the machine through whose grind benefits may be conferred on some at the expense of all, and enterprises be fostered or destroyed at will, contestants for the prize of its power will spread their nets to catch the most powerful and combine the most influential, until extravagance, plunder and corruption will fill the land. Elections, being the game for great stakes, will be controlled by political gamblers; money, not morality, will rule its results; and the democratic *patriarcha* will become the paternal plutocrat of the country.

But this is not all. As soon as paternalism holds itself ready to help its children out of the common fund, furnished by the taxation of all, every one will demand what another receives. They will argue, if one enterprise is aided by gift or loan, why not all? Equality is equity. If the government may lend to C without security, why not to others on mortgage? If one producer receives bounty to raise his crop, why not all? If one is relieved of loss from fire or flood, why not all? Is not the government the impartial father of all its children? If it directly or indirectly helps one to make a billion out of the many, why not, in turn, help the many to distribute their excess? If it can give plethora of wealth to monopoly, why not aid the commune by healthful depletion, in order to return ill-gotten gains to the victims of privilege?

These questions confront us with this truth: Privilege and

communism are twin monsters from the womb of the *patriarcha* of Filmer, the paternalism of to-day. Privilege sows the wind; the commune will bring the harvest of the whirlwind! The feast of fat things once open to the hungry, the doors will not be easily shut upon their claims. Precedents become customs, and customs the settled law; and privilege and monopoly, once established, will claim their own perpetuity as a vested right. In any form of government where the paternalistic idea takes root, the danger of over-action will always exist. If it be a monarchy, in the language of John Milton, "the very trappings of a monarchy are more than sufficient to defray the expenses of a republic." If in a republic, the stupendous taxation and expenditure of our federal, state and municipal governments will show that the mere democratic form of government will not save a country from the disasters of this perilous principle.

Mr. Spencer, in his "Justice,"¹ says: "In France bureaucratic despotism under the Republic is as great as it was under the Empire. Exactions and compulsions are no less numerous and peremptory, and, as was declared by English trade-union delegates to a congress in Paris, the invasion of citizens' liberties in France goes to an extent which 'is a disgrace to, and an anomaly in, a Republican nation.' Similarly in the United States. Universal suffrage does not prevent the corruptions of municipal governments, which impose heavy local taxes and do very inefficient work."

In 1890 the revenue of the Federal Government was about four hundred millions; of the States, from *ad valorem* taxation, about sixty-eight millions; of counties, about ninety-three millions; and of municipalities, about three hundred and four millions; or nearly nine hundred millions for all purposes, or about \$14 per head.

These considerations show the importance of this cardinal canon of political science: Limit law-making to the defense of man-right, and of his self-use for self-development, without aid or hindrance from government. When it passes this

¹Page 178.

limit and becomes paternal, the *patriarcha* will burden all for the privilege of the few, and give monopoly to the few to the exclusion of the mass. It will build up the plutocracy of the few by the side of the pauperism of the mass. In the philosophic statement of a late able writer, "the beneficent Jeffersonian philosophy prefers that nothing shall be done by the general government which the local authorities are competent to do; and nothing by any governmental power which individuals can do for themselves."¹

The supreme importance of constitution-making in the organization of the legislative department, with its enormous power for good and evil, invests this problem with an importance momentous to the liberty and rights of men. The greed of power, innate in the human heart, is the peril in all systems to the rights and liberties of the people. To win this great prize, there will be fierce competition that its energies may be diverted from the happiness of the mass to the benefit of the few, or to the glory and ambition of one man. The struggles in modern times from municipal control is illustrative of the first proposition, as the imperial ambition of a Napoleon is a sample of the last. The peril to liberty exists in all forms of government; perhaps more in a democratic, because the people, relying upon the form of authority, are less vigilant to watch the abuse of power by their governmental agents than where power is hereditary, and not dependent upon the popular will.

How, then, are these great evils to be prevented in the organization of the legislative department of government? By what form of organism and on what basis can they be prevented? Can we put a hook into the nose of this leviathan,² or make a covenant with him and make him a servant forever?³ To what hands will you confide the purse and the sword? To whom can you intrust the wielding of these tremendous social forces before which the single man will be impotent? Where can you find safety for lib-

¹ 2 Tilden's Works, p. 514.

² Job, ch. 41, v. 2 and 4.

³ Hobbes' name for government.

erty, when power, possessed of the national purse and with its hired myrmidons, clad in steel and weapons of war, shall array itself against the unarmed citizen in his humble home. Your government, executive, legislative, judicial, must at last be in human hands, and be directed by human hearts, with all the sinful propensities of selfishness to prompt its motives, direct its policy and to impel its power. You make them your guardian — but *quis custodiet custodes?* This is your problem. How will it be solved?

A comprehensive answer can readily be given. Wed power to right, and liberty is safe and despotism is impossible. Divorce them — liberty dies and despotism is assured. Let the hand which holds the right hold also the sceptre of power, and right cannot die but by suicide; for power strikes self when it strikes right. On the contrary, put power in the hands alien to right, and right will be sacrificed. If the man whose rights are to be affected wields the power of government; if the hand which pays the tax be the hand which lays it; if the man who is to be subject to laws be the maker of them, all will be well. In the language of a great writer: “Contrasts between the states of different nations, and between the states of the same nation at different periods, have strongly impressed men with the general truth that if governmental power is in the hands of one, or in the hands of a few, it will be used to the advantage of the one or the few; and that the many will be correspondingly disadvantaged. That is to say, those who have not the power will be subject to greater restraints and burdens than those who have the power — will be defrauded of that liberty of each, limited only by the like liberties of all, which equity demands — will have their rights more or less seriously infringed.”¹

§ 62. In the ancient world, power, with absolute irresponsibility to the popular will, was in the hands of hereditary monarchs, or class aristocracies. This made tyranny inevitable, for power was not wedded to right, but was divorced

¹Spencer's Justice, p. 177.

from it. If there ever happened to be good government, it was from the grace of the person who held power, but could not be compelled. The leviathan was without a hook in the hands of the people. The rude democratic policies of Greece were in fact aristocracies — that is, power was in the hands of a class, while its subjects had no voice. The *πλῆθος πολιτῶν* of Aristotle were really the few who governed the mass. It was an aristocracy. For example: in Athens, the *πόλις* of Attica — the *ἐκκλησία* — the *πλῆθος πολιτῶν* — was composed of citizens and was the body to which magistrates were responsible. In Attica it is probable there were 350,000 people, at least. Of these it is said 30,000 were citizens, — the rest were not citizens, and many were slaves. Not one-half of the men of Attica, therefore, were citizens. The number who were present in the *ἐκκλησία* was never more than 4,000 — that is, only one-seventh of the *πλῆθος πολιτῶν* of Attica, and about one-twentieth of the adult males. This was not the people, but a class and a very small class of the people, and usually composed of the residents of the city, to which the agricultural population of Attica were rarely, if ever, admitted.

But what an assembly for any kind of deliberation! In the language of Mr. Madison,¹ "If every citizen of the *ἐκκλησία* had been a Socrates, still the assembly would have been a mob." It is further obvious, that the personal holding of power by the people would be impracticable for any but a very small state. The ancient states were centered about a *πόλις* (a city), and the power of the whole was inevitably exercised by this *πόλις*. The mass of the people in Attica, as we have seen, had no part in the government. Much more so would it be in the great Roman Republic when it was assuming imperial dimensions.

Some other arrangement, therefore, than a populous assembly, will be needed for a populous country. For example, how could the 14,000,000 of voters in the United States assemble for legislative deliberation in one *ἐκκλησία*?

¹ Federalist.

Prof. John Fiske, of Harvard, in his "Beginnings of New England," has finely stated the distinction between the diverse methods of nation-making in oriental countries, in the Roman Empire and in Great Britain. "The oriental method is conquest without incorporation; the Roman, conquest with incorporation, but without representation; the English, conquest by incorporation with representation."

Representation is the modern method by which the will of a great multitude may express itself through an elected body of men for deliberation in law-making. It is the only practicable way by which a large country can give expression to its will in deliberate legislation. Give suffrage to the people, let law-making be in the hands of their representatives, and make the representatives responsible at short periods to the popular judgment, and the rights of men will be safe, for they will select only such as will protect their rights, and dismiss those who, upon trial, will not. *True representation* is a security against wrong and abuse in law-making.

We come now to make an important distinction between civil right and political power. Mr. Spencer, in a part of the passage already quoted, adverts to this distinction with great force. "Those shares of political power which in the more advanced nations citizens have come to possess, and which experience has shown to be good guaranties for the maintenance of life, liberty and property, are spoken of as though the claims to them were of the same nature as the claims to life, liberty and property themselves. Yet there is no kinship between the two. The giving of a vote, considered in itself, in no way furthers the voter's life, as does the exercise of those various liberties we properly call rights. All we can say is that the possession of the franchise by each citizen gives the citizens in general the power of checking trespasses upon their rights: a power which they may or may not use to good purpose."¹

We have already seen that the *quantum* of liberty which

¹ Spencer's Justice, p. 177.

a people can safely enjoy consistently with peace and order differs in different nations according to their moral fitness for self-government; those being entitled to enjoy larger liberty where the civil power is not needed to control them, because of their moral self-control; and those nations which require the large use of civil power to maintain order, because of their lack of moral self-control, cannot be equally free without danger to social order.¹

The same qualification which is thus made of the right of diverse peoples to freedom must *a fortiori* be applicable to the exercise of political power by such people. If the external civil power must limit the liberty of a savage to conserve social order, for a stronger reason the constitution of a people should abridge the power of such a savage in the exercise of political functions. If he cannot control himself, and therefore must be controlled by others, why should he have equal power to govern the state with those who have perfect power of self-control? It may be safe to give suffrage to a perfectly moral man, when it would be wholly wrong to give it to a savage in ignorance or a savage in brutality.

The equality of right, which has been insisted upon between all the members of society, to that which to them is the gift of God, is not at all infringed by denying to those who have such equality of right an equality of power in conducting public affairs. We may not take away his right, and yet we may deny him the power. We cannot divest him of what he has by Divine title, but we may refuse to him the exercise of a political function for which he is either unfit by lack of intelligence, or by reason of having no sufficient interest in the thing which his act will control. Civil rights must be conserved with scrupulous fidelity. Political power can only be safely conferred upon those who have intelligence to act wisely and an interest to act honestly.

§ 63. Right of suffrage is a misnomer. Suffrage is a power which should only be exercised where there is fitness for

¹ *Ante*, § 53.

it. Who shall exercise suffrage — who shall constitute the *πληθος πολιτων* of the *de facto* Body-politic — is a fundamental question which the Body-politic must decide upon a just view of the true relation between the power of the suffragans and the rights of the whole people. Each man may claim power to govern himself, and therefore that he is entitled to suffrage, but the answer to this claim is: first, can he govern himself wisely and well; and second, has he the intelligence and the honesty to govern others as well as himself. His power over himself and others, exercised through suffrage, is therefore a matter that cannot depend upon his volition only, but upon that of the others, whom, by his suffrage, he controls as well as himself. Who shall have man-right is a question settled by the Divine title; but who shall have political power over himself and others must be a matter of agreement and convention.¹ The question is, whether the man is fitted by intelligence to perform the function, for if not fitted, he cannot claim to have the right to do it; the second, has he such interests in the matters controlled through his suffrage as to check the misuse of power which self-interest always prompts? If he lacks intelligence, it is the greatest absurdity to give him suffrage and the greatest wrong to the community. If he lacks community of interest in the laws which are to govern the community, it is not only a serious danger but a false principle to give it to him, for thus you give power to the hand which is alien to the right of others which it controls. Right and its power of self-defense should co-exist, unless its power through ignorance or want of interest would be impotent for self-defense and potent for self-destruction and the ruin of society.

Hence, representation and taxation have always been correlated as power and right. The hand that lays should pay the tax, and *vice versa*; else tax-layer will plunder tax-payer. The laying and paying must go together in order to the protection of the right of property. This is liberty. To divorce

¹ Burke's "Reflections on the Revolution in France." 1 Burke's Works, pp. 481-82.

the two would result in the destruction of the right of property. This is tyranny.

These general views on the subject of suffrage are formulated in the sixth section of the Virginia Declaration of Rights, June 12, 1776:

“VI. That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.”

The same qualification as to interest is indicated in the Constitution of Massachusetts of 1780, chapter I, section 3, article IV:

“Every male person being twenty-one years of age, and resident in any particular town in this commonwealth, for the space of one year next preceding, having a freehold estate within the same town, of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to vote in the choice of a representative or representatives for the said town.”

Like qualifying restrictions of suffrage existed not only under the English system, but in every state of the Union at the time and subsequent to the Revolution, and even at the present time, though the restrictions have been very much removed, and the extent of suffrage become well-nigh universal; but these instances show that American political science recognized the legitimacy of qualification upon the universality of suffrage.

Let suffrage, then, be conferred upon all whose intelligence and community of interest in the affairs of the state are sufficient to ensure that they will wisely and honestly perform this important function, and make them a true representative of the real Body-politic in the election of the law-making department. The more liberal the rule of suffrage, conserving the essentials of reason and honesty,

the better. To restrict suffrage further than this is to create a class oligarchy, and not a true popular constituency. Under such conditions, representatives elected for a limited time would make the legislative body an approximate representation of the people's will. Infidelity to the public will by a representative would be followed by dismissal from service, and the fear of this would reasonably ensure fidelity to delegated duty.

§ 64. But will this simple method solve the problem in hand? Will it make a true representation of the people's will? It will be observed that it only secures the fidelity of the delegated agent to those who elect him, and who may re-elect or dismiss him. Where social interests are homogeneous, and there are no antagonisms or rivalry among the people composing the society, the simple method suggested will bring together men entirely at one in interest and purpose, whose only dissension would be in their several judgments as to the best plan for the conduct of the government. No one's action would be aimed at the injury of any class in society, because injury to such class would be alike injurious to all. No representative could strike a blow at the constituency of another without inflicting it upon his own. Evil laws might be made, but these would result from error in judgment, and not from an evil motive, if any, because a law injurious to one would be alike injurious to all.

It follows that as soon as the interests of society are homogeneous, the simple representative principle, if equal, would secure all parts of society from the results of sinister motives and unjust action, though they might be liable to injury from error in judgment as to the true policy for all.

But when society is composed of heterogeneous classes commingled in the same locality, or in different localities; when the interests to be affected by law-making are not alike, but are rivals and antagonistic—the one seeking for some advantage at the expense of the other, contention will arise among constituencies, and will be transferred at

their instance, through their respective representatives, to the halls of legislation. The debate between conferees as to the regulation of a common interest would become a fierce war between hostile interests. The representative, in good faith to his constituency, would strive to make laws in their interest, and the laws would be moulded by the motives of the constituencies for the benefit coveted, if their representatives constituted a majority, at the expense and to the injury of those constituencies whose representatives constituted only the minority in the body — powerless to defeat, and only able helplessly to protest. The resistless majority would crush the impotent minority. The interest of the minority would have no true representation, because its representatives would be overborne by the dominant majority. The hand of the majority, which would wield absolute power, is not the hand of the minority, which holds its right, but the hand of an alien enemy to that right. Power and right are thus divorced, not wedded, and the representative majority would destroy without mercy the unrepresented minority. In such a state of society, the form of representation is no shield for the rights of the minority, but a sword of power for their ruin.

It is hardly necessary to cite examples of this conflict of antagonistic interests in the history of our race. Many such will be fully explained hereafter, but for the present, to meet the natural inquiry which will arise in the mind of the reader, a reference to some striking instances may be made.

Every absolute monarchy, every oligarchy, every aristocracy in history has been the alien hand which has destroyed the rights subject to their authority and which had no adequate representation in the government to obstruct its action. The Plebs in Rome were dominated by the majority power of the patricians. The American Colonies had, and could have, no substantial representation in Parliament, and independence was the only door for their escape from an alien tyranny. The contest to-day of Ireland for Home

Rule is based on the fact, not that it has no representation in Parliament, but that, under the specious veil of representation, it and its destiny is dominated by the British majority, against which it can only enter its solemn but impotent protest. In all cases where power is in the hands of any class or interest which is antagonistic to others, whether the others have a minority representation or none, the result is tyranny. History is full of this truth, speaking by numberless examples.

§ 65. How, then, is this most difficult problem in political science to be solved? Representation protects constituencies from false representatives; but how shall we protect the minority constituency from a majority constituency, which, acting in legislative body, are represented in proportion to their numbers? Our representative principle may save the majority from the domination of the few, but how shall we save a minority from the tyranny of a majority? Two devices may be suggested:

First, in the machinery of the government, give to each class or order a separate and distinct organism through which its will may be voiced, and require a concurrence of each to all action. Thus each will check the hostile action of the others, and all must concur in order to any action.

Mr. Burke, in his "Reflections on the Revolution in France," has stated this principle with great strength and beauty. Addressing himself to the French mind, he says:

"In your old states you possessed that variety of parts corresponding with the various descriptions of which your community was happily composed; you had all that combination, and all that opposition of interests; you had that action and counteraction which, in the natural and in the political world, from the reciprocal struggle of discordant powers, draws out the harmony of the universe. These opposed and conflicting interests, which you consider as so great a blemish in your old and in our present constitution, interpose a salutary check to all precipitate resolutions.

They render deliberation a matter not of choice, but of necessity; they make all change a subject of *compromise*, which naturally begets moderation; they produce *temperaments*, preventing the sore evil of harsh, crude, unqualified reformatations, and rendering all the headlong exertions of arbitrary power, in the few or in the many, forever impracticable. Through that diversity of members and interests, general liberty had as many securities as there were separate views in the several orders; whilst, by pressing down the whole by the weight of a real monarchy, the separate parts would have been prevented from warping and starting from their allotted places.”¹

This device is often called “the checks and balances in government,” or by Mr. Calhoun, in his acute analysis of the science of government, in his *Disquisition on Government*, “A Government of Concurrent Majorities.”² The substance of his view is this: So organize your government that each interest shall act independently of the other, and instead of allowing that one which has a preponderance of numbers to govern that which has the minority, require a majority of each to concur in the political measures proposed, and thus give to neither any power over the other, but by that other’s consent; and allow no action in either unless both concur in the consent. Power and right are thus wedded and tyranny is prevented.

Government under this device represents each and every interest. It voices, not a numerical majority of the whole, but the concurrent majority of each and all its members. Each is thus potential for his own defense against others, but impotent for offense to others. It prevents injustice to any and enforces justice to all. Out of the conflict of these distinct orders liberty emerges and is secured. In their uni-

¹ Burke’s Works, vol. I, p. 470.

² 1 Calhoun’s Works, pp. 24–29. John Stuart Mill, speaking of Calhoun’s posthumous work, and of its author, says he was “a man who

has displayed powers as a speculative political thinker superior to any who has appeared in American politics since the authors of ‘The Federalist.’”

fication under mere numerical majority, liberty dies, and tyranny is inevitable.

Second. The second device which may be adopted is this. Let any peculiar and distinct interest be regulated and controlled exclusively by that order or class in society which holds it—by them alone—excluding other heterogeneous elements entirely from any vote in respect to them—and letting all regulate homogeneous interests together in one government. Under this each order of society, under a separate governmental organism, would regulate its own distinct interests with which other orders, having nothing in common, would have nothing to do in the way of regulating them.

§ 66. The mode in which these two devices have been applied in the history of the race will be now explained, and but for these two devices, which have saved liberty in all the ages, political history would be a dreary rehearsal of unbridled despotism as the destroyer of man-right. In illustration of these two devices some striking examples may be cited:

(a) In the first stages of the Republic of Rome, in the *comitia centuriata*, where suffrage was based on property, patricians and plebeians were admitted to its deliberations, but the patricians had a majority, and the oppression of the plebeian minority gave rise to the celebrated secession of the Plebs to the sacred hill, as their only protection from the government, which had become an exclusive aristocracy. The patricians used every means to persuade them to return. A treaty was made between them as between two distinct nations and resulted in the establishment of the office of Tribunes, who were the representatives of the plebeians alone, by the plebeians, with the power of veto upon the action of the patricians. This tribunitian power, which was exclusively in the hands of the plebeians, was a check upon patrician power, and was maintained throughout all the subsequent history of the Roman Republic. In other words, no law or act could be passed to the detriment of the plebeians to which their concurrent majority did not consent; and, on the contrary,

the plebeians could exercise no power against the patricians without the concurrence of the patricians. Rude and imperfect as this device was, it was effectual in the protection of each order from the oppressive action of the other. The doctrine of concurrent majorities saved the liberty of the members of each order from destruction by the other.¹

(b) In the history of the English Revolution, a great contest arose during the reign of the Stuarts as to the power of the king to take a subject's property without his consent, expressed through a vote of the House of Commons. Taxation had previously been held by the people of England to be unlawful, unless with the popular assent in the House of Commons. If the king could tax the people without the assent of the House of Commons, power would have been alien to right. The great case of the ship-money exacted by the king of John Hampden in 1636, decided against him by a venal judiciary, for the time divorced the power of taxation from the right of the tax-payer. English freemen did not tamely submit. The Revolution was the result, and resulted in the Constitutional Monarchy of 1688-89, by which the power of taxation was secured to those who paid the tax. This wedded power to right, which the House of Stuart had attempted to divorce.

(c) The American Revolution of 1776 turned upon the same pivotal issue. Parliament had in a preamble asserted the right of taxation of the Colonies by the Parliament of England, in which the Colonies were not represented at all, and in which, if they had been represented in proportion to their numbers, the representation would have been a mockery, because their representation would have been a minority only, subject to be overborne by the majority of English representatives. This called forth the splendid eloquence of Edmund Burke in his speech on "American Taxation," in which he used this language:

"Could anything be a subject of more just alarm to America than to see you go out of the plain high road of finance,

¹ Arnold's History of Rome, ch. 8.

and give up your most certain revenues and your clearest interest, merely for the sake of insulting your colonies? No man ever doubted that the commodity of tea could bear an imposition of three pence. But no commodity will bear three pence, or will bear a penny, when the general feelings of men are irritated, and two millions of people are resolved not to pay. The feelings of the colonies were formerly the feelings of Great Britain. Theirs were formerly the feelings of Mr. Hampden when called upon for the payment of twenty shillings. Would twenty shillings have ruined Mr. Hampden's fortune? No! but the payment of half twenty shillings, on the principle it was demanded, would have made him a slave. It is the weight of that preamble, of which you are so fond, and not the weight of the duty, that the Americans are unable and unwilling to bear."¹

A statement of the grounds of this revolutionary conflict will not be out of place. Each Colony had substantially conceded that Parliament might properly legislate for the general welfare of the empire of which each was a part. The Colony did not even make a point of its representation in the Parliament, as to matters which concerned the whole empire. As to these, it was content that as the welfare of all was the interest of all, the power might safely be vested in the general council, acting for the general welfare of all and the common defense of each and every part.

But when the local interests of each Colony, when its internal policy, its home rights were to be regulated, its people felt that these interests and rights, and this internal polity, could only be safe when under the exclusive control of the political power which represented the people of the Colony, who held these interests and rights and were concerned in this polity. This was self-government. The admission of any other influence was to allow their rights to be controlled by aliens. This exclusive power was wedded to the personal right. If any alien to the right was to participate, it *pro tanto* divorced political power from personal right, destroyed

¹ Burke's Works, vol. I, p. 196.

real self-government, and subjected personal and home right to the influence and government of real aliens.

In vain did British sophistry plead that the English voter was a fellow subject of the Colonist, and not an alien. The Colonists replied, '*quoad hoc*: as to my home interest, my home right, my internal polity, you know nothing and care less; your interest is not mine; nay, may be antagonistic to mine; and to allow you an equal voice with me, or worse, a major voice to mine in your Parliament, would be to give up my personal liberty to the control of real aliens, and make my condition one of servitude to your mastery.'

And hence, when some suggested colonial representation in Parliament, the fathers answered that it was a delusion and a snare to subject internal polity to a Parliament of 500 members, in which the Colonies would have 50 and England 450 votes! The hands which wield the power must be the hands that hold the interest; home rule is essential to home liberty, and the safety of home rights, and the integrity of home polity! The home rule they needed was a real, not a formal, representation; an absolute authority and not a barren sceptre.

In the case of the Colonies the evil of domination was aggravated by its sectional character; Great Britain, the government, was 3,000 miles away from the interest to be regulated. The worst form in which this alien government can be presented is when the rights and interests are in diverse localities, separated by a geographical line, and the growth of social conditions in the section separated by that line. Sectional tyranny is unmitigated by presence and sympathy. Class over class may be so mitigated. In the one case, the oppressor never hears and hence never heeds the cry of the oppressed. In the latter he may do so.

"Government by one man often fails to understand the government, but it usually defers. Government by a foreign people neither understands nor defers; it has no adaptation to the wants or temper of the governed. It is, therefore, about the worst government that can be imagined."¹

¹ Tilden's Works, vol. I, p. 290.

The government of a localized minority by a localized majority is in substance the government of one people by another people — by a foreign people. The alien hand of power governs the distant right without sympathy, and unalleviated by the presence of its victims. Alien tyranny is not only an intolerable foe to human liberty, but the destroyer of human happiness. The sectional majority is an alien despot.

(*d*) In Great Britain, where hereditary power is vested in the King and the Lords, and popular power in the House of Commons, the first device is brought into use for the protection of each against the hostile action of the others. Hereditary title to power would not stand a day against the hostile action of the popular body. This is evident from the present condition of things in England, where the question of abolishing the House of Lords, or diminishing their authority and power, is prevented by the fact that any such change in the constitution of the House of Lords would require its concurrence. On the other hand, the danger to popular power from the adverse action of the hereditary class is avoided by the concurrence of the House of Commons being necessary to any such change, and if both the Lords and Commons should seek to abridge the prerogatives of the Crown, the monarch is vested with the veto upon any action of these two bodies, so that no legislation can be carried out without the concurrence of King, Lords and Commons — the three estates of the realm.

(*e*) In the Federal system of our Union both of these devices are finely illustrated. In the construction of the legislative department of the Federal government, we have a bi-cameral Congress, composed of the Senate and House of Representatives. The Senate is composed of two senators from each state without regard to population. The House of Representatives is composed of members elected by the voters of each state, in the main in proportion to numbers. The Senate represents the equipollency of states; the House mainly the power of states according to numbers.

If the numerical majority of the whole country in the House of Representatives should seek to invade the statehood of the members of the Union, it could only be done by the concurrence of a majority of states in the Senate. On the other hand, if the states should attempt to invade the rights of the populations of the country, it could not be done but with the concurrence of the House which represents the populations. The concurrent majority of the two Houses is thus essential to all legislation.

But lest this concurrence should be brought about to the injury of any interest or right of the people, the veto power in a qualified form is vested in the President, who is elected on a basis which combines both the equality of the states and numbers in each of the states. His veto may be overcome by a two-thirds vote in each of the Houses concurring. Thus all legislation is dependent upon the concurrence of the majorities of population, of states, and of population and states combined in the election of the President.

And if this three-fold concurrence were obtained in any legislation which violated the Constitution of the United States, the judicial power is armed with authority to declare such legislation in effect to be null and void. So that in order to any legislation having full effect under our Federal system, it must have the concurrent sanction of the two Houses of Congress, of the President and of the judiciary. The legislative power of the Federal government is, however, by the terms of the Constitution, limited to such matters as are delegated to it by the Constitution, and all legislative power not so delegated is reserved to the states. If, therefore, the legislative department of the general government should undertake to exercise the function of law-making upon any subject thus reserved to the states, such action would be wholly null and void and would be so declared and enforced by the judicial power of the United States.

The respective states, as to their reserved legislative power, have vested this power in bi-cameral legislatures, without whose concurrence no law can be passed, and very often

with a grant of a veto power to the governor. And, in the state systems of government, the same power in their judiciary to declare void any legislation which is contrary to the state constitution is fully recognized; so that no state law can be effectual which has not the concurrent sanction of both houses of the legislature, the governor and the judiciary.

It will be seen that in this Federal system, embracing the Federal government and the various state governments, the device of the concurrent majorities is in full force, and the second device is brought into operation by leaving to each state, without any interference in its legislation by any other state, the exclusive law-making power as to all interests which exclusively belong to that state.

This wonderful combination of these two devices presents an example in which the guards to the personal rights and liberties of the people are better defined and more effectual than under any system of government known among men. The full explanation of the principles of this system will be reserved for future consideration.

How majestic is this essential unity of the people's will and purpose through diverse and independent agencies for their expression! How true a unity is obtained by not taking the will of the whole without reference to the parts, but the will of each distinct part in order to attain the will of the whole! How superior this to a government based on the majority of numbers! The government of the numerical majority is the mechanism of brute force: ours is the resultant of the moral forces of intelligent popular will over brutal selfishness.

It will be perceived that this is the security by dividing power and distributing it between agencies independent in will and action. So that no one person is permitted to wield power in more than one of the three great departments of government, or in more than one of the bodies constituting such department. This maxim for the division of the department of government into three departments, whose functions are to

be performed by distinct and independent agents, no one of whom shall be allowed to act in any other, is fatal to the designs of any one department against right and liberty, because such department is powerless unless it can combine all the others in its purpose of usurpation.

“When the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

“Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

“There would be an end of everything were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”¹ This principle will be explained more fully hereafter. A mere reference will for the present be enough.

(f) There is a practical difficulty in applying the second device to cases where diverse and antagonistic interests are commingled in the same society. How to distribute power between the individuals in the same community so as to apply the first device is quite difficult, but the application of the second device, where one class of a community, with a distinct interest from other classes, shall have the exclusive power of regulating its own, has been always an almost insuperable difficulty.

It was attempted in Rome when the plebeians, after the secession, were empowered to pass the *plebiscita* in the *comitia tributa* on the motion of one of the plebeian tribunes. These

¹ Montesquieu's "Spirit of Laws," Rights, June 12, 1776, Art. 3, in ac-Bk. XI, ch. VI; Virginia Bill of cord.

resolutions so passed by the plebeians alone originally, were laws only binding on the plebeians, until a later date when they were made to bind the whole people, which innovation resulted in the evil, to which we have already adverted, of the one class legislating for all; so that the plebeians, who secured this power for their own defense against the patricians, converted it into a means of dominating the patricians by the plebeian power.¹

But the application of this second device, where distinct interests are localized, and in different sections of the country where they exist, is more easy, and exists in other countries as well as our own. Thus, when the Roman Republic, by conquest, added other countries to its domination, the great Republic left to the *municipium* — the central city of the conquered province — the regulation of its local affairs, while assuming to govern it by laws regulating the general policy of the Republic. But these *municipia* became the *nuclei* of the independent action which saved liberty from the destruction of the centralized despotism. As we have seen, the application of this principle to the states of our Union has been eminently successful and salutary.

§ 67. The origin of this principle was in the Teutonic institutions of *vicus*, *pagus* and *civitas*, where the units of power in the small localities preserved their independent action against the unified action of the state. These Teutonic institutions are well described by a late German writer:

“Montesquieu said very truly, that the germs of parliamentary constitutions are to be found in the forests of Germany. In the primitive forms described by Tacitus, in which the Teutonic kings co-operated with the local princes and other chiefs on the one side, and with the great community of freemen on the other, we recognize clearly the rude beginnings of the free representative government which later centuries produced.

“The Teuton does not derive law, at least not directly, from the will of the nation: he claims for himself an inborn

¹ Mackeldy's Roman Law, § 32.

right which the State must protect, but which it does not create, and for which he is ready to fight against the whole world, even against the authority of his own government. He rejects strenuously the old idea that the State is all in all. The whole relation is reversed. To the Teuton individual freedom is the supreme thing. He is induced to sacrifice a part of it to the State in order to keep the rest all the more securely. . . . A further consequence for Public Law is that the Teutons in general admit no absolute power of the State, even in matters affecting the community. The Roman conception of *imperium* is foreign to them. Before obeying they wish to deliberate and vote. Their estates (*Stände*) are a political power with which that of the king must be united in order to make laws. Yet the idea of the State as a collective person is still, as a rule, unintelligible to them. They tend rather to break up the State into actual persons or groups of persons. They understand it primarily as embodied in the king or other princes, who are at the head of the courts of justice, and of the assembly of the people, in the chief of the hundred (*Gau*), the tithing (*Zent*) and the township (*Volksgemeinde*). One set of persons sometimes strengthens and sometimes limits another; thus the whole organization of the community, even in its parts, is filled with the spirit of freedom. Unity is relatively weak, but the independence of the parts is strong.”¹

These Teutonic institutions were transported from the forests of Germany with our Saxon ancestors, and came to be the shires, hundreds and townships of the Anglo-Saxon polity. And these again have been transferred to America, so that in New England the township is the political unit to this day, and the townships or shires, or counties, in all the other states of the Union. Each of these distinct political units has its political power of regulating its local affairs, without interference by other like units, and practically in a large degree without interference by the central power of the state. It is only necessary to add, that in

¹ Bluntschli's "Theory of the State," pp. 43 and 44.

modern times more largely than in the middle ages, municipal government for cities and towns under charters, which secure to them exclusive legislative power for their local populations, is a distinctive feature of English and American society. These charters for cities and towns were in some cases guaranteed by *Magna Carta*, and the free cities of continental Europe have been pointed out as the *nuclei* of individual liberty against the despotism of the Continent.¹

To illustrate by a simple example the application of these two devices: Take two sections of country, A and B. By analyzing their condition, we find, first, that A has some rights in which B has no community; second, B has some rights in which A has no community; third, A and B have some rights in common. A and B are united in the same society. What system of government is best? As to the first and second classes of rights, let the second device apply, and A have confided to it exclusive control of its exclusive rights; the same in the case of B. And as to those rights which are common to both A and B, let A and B unite in counsel, A having control of one branch of the legislature and B of the other. This will be the application of the first device. Under this arrangement the exclusive rights of each will be under its exclusive control. Power and right will be wedded. As to the common rights, power and right will be wedded, because neither A nor B can do anything against the right of the other without the concurrence of the two departments which they respectively control.

This example is strictly analogous to our Federal system. In the Union all the states have some common interests. No one state should have control over these, for the power of the others in these common interests would be excluded and thus right be divorced from power. But each of the states have separate and exclusive interests. All should not unite to control these, for, to the extent that others than the state itself were so admitted to control, power would be alien

¹ Guizot's History of Civilization, Lecture 7.

to right, and thus power and right would not be wedded. All must unite to control the interests of all; each must control the exclusive right of each. If all manage each, or any one manages all, power and right would be divorced.

§ 68. This discussion conducts us to the conclusion that in the construction of the Legislative Department the following rules should be observed:

First. Limit the powers of all governments to such laws only as conserve each man's right and liberty, and deny all power to create privilege or monopoly, or anything tending thereto.

Second. Keep in full force the two devices already set out.

Third. Keep the three departments — executive, legislative and judicial — in separate and distinct hands, so that no one exercising the functions of either shall exercise those of any other; especially keep those who exercise the functions of legislation from exercising the functions of either of the other departments.

Fourth. In the subdivision of the state into counties, cities, and the like, confer on the people of the locality the power to regulate their local interests, thus decentralizing these localities from the general power of all which regulates common interests.

Fifth. Prescribe bounds to legislative discretion either by limiting power to those which are delegated in terms or by such prohibitions as will secure the liberty of the man against all pretext for bad laws by the usurpation of power.

CHAPTER IV.

ORIGIN OF ENGLISH INSTITUTIONS.

§ 69. It would be very interesting and instructive to trace the history of human institutions and of their development in the diverse forms of government which have prevailed in the various countries of the world, and thus to gather from the experiences of nations lessons for our own future, and canons in political science based upon a larger generalization from the particular cases as we would find them in human history. To do this fully would be impracticable, for, despite the results of research, we know but little comparatively of the machinery of ancient systems of government, and would not be able, therefore, to deduce accurate conclusions from our imperfect information.

In the work that we have in hand, we must be content to examine that system of institutions which stands most closely related to our own; to trace it to its origin; follow the historic processes through which it has assumed its present forms and functions, and to ascertain how far the seeds of its own polity have produced fruit in our own system of constitutional government. Even in this circumscribed area of investigation, we must consult brevity by condensing the historic facts, and eliminating from the mass of material which recent scientific research affords those which throw light upon the practical questions of our Constitutional Jurisprudence.

The fact of a common genesis of the different nations of the world has been reached by modern archaeology, by detecting in the identity of the roots, and sometimes in the identity of the words of different languages, the common origin. Without pretending to go into these interesting questions at all, it may be stated that by this process of inves-

tigation it may be assumed as established that the Aryan language was the original tongue from which, as a parent, the Sanscrit of northern India, the Iranian or Persian, the Greek, the Italic, the Celtic, the Slavonic and the Teutonic are the undoubted offspring.¹

Prof. Whitney calls this the "Indo-European language," and it has been called Aryan because of the place of its Asiatic origin. It is held to be established that this common Indo-European tongue was once spoken by one people dwelling in one domain, but who, when, and where, is asked with no satisfactory response.² This scientific conjecture is plausible: that such a people existed in the middle of Asia; that colonies issued from it into India and Persia, and westward into Europe. That they went into Greece and gave the world its philosophy; to Rome, under whose eagle it conquered the world, and gave civilization and law to Germany, to Gaul, to Russia and to Spain.³ Mr. Freeman⁴ shows that this Aryan race had a distinctive civilization before their migration. "As families and clans grew into tribes, and as tribes grew into nations, each has a king, or chief, of some kind, and council of elders and nobles, and a general assembly of the whole people." Three classes of people existed in their society: "nobles by birth, the common freemen, and their slaves."

Of these offspring-nations of the parent people, Greece was the first in time and had pre-eminence in European history. It is no part of this work to treat of this wonderful people, or of its philosophy, arts, literature and polity. Its literature and philosophy have survived the states which produced them, and have molded the mind of the World long after Greece has ceased to command its notice.⁵

¹ Whitney's *Life and Growth of Language*, 180, 181.

² *Idem*, 192-93.

³ *Ency. Britannica*, vol. II, p. 672.

⁴ *History of Europe*.

⁵ The reader is referred to an ar-

ticle on Greece in the 11th volume of the *Encyclopædia Britannica*, page 80, and to the numerous histories of Greece which have been written in this century.

The second in time was Rome, whose great republic, changed into the great Empire, gave the jurisprudence and polity through its imperial sway to a greater or less degree to all the countries of Europe. These two great civilizations prepared the way, under Providence, for the modern systems of polity.

Greece had given the world literature, philosophy and art; Rome, jurisprudence and the organization to control nations by government; and these, under the influence of Divine teaching, through the Semitic race, have given to the world, in this modern era, Christian philosophy, constitutional government and liberty for man.

At a very early period, and long before the Christian era, colonization of Aryan or Indo-European people was made in the northeastern part of Europe and in the northern part of what is now called Germany. Recent research has been active in getting at the genesis of our English institutions, and the field is rich in interest and in valuable fruit for political science. We must limit ourselves to presenting a skeleton of results, and referring the reader to works that will satisfy his speculative curiosity.¹

Stubbs has said, in succinct language, of the parent stock of the English people: "The German element is the parental element in our system, natural and political."² This claim may be confronted with modifying facts, but as a general conclusion seems to be established on firm foundations.

In the wars of Julius Cæsar he came in conflict with this Teutonic race, and has left in his history a sketch of its habits, etc.³ Cæsar praises their industry, chastity, hardihood and hospitality. They hunt, and study war; nomadic, wandering from place to place; cultivating a spot for a year,

¹ Palgrave's *Rise and Progress of the English Commonwealth*; Kemble's *Saxons in England*; Green's *History of the English People*; Freeman's *History of the Norman Conquest*; Stubbs' *Constitutional History of England*; Stubbs' *Select*

Charters; Creasy on the *English Constitution*; Taylor on the *Origin and Growth of the English Constitution*.

² 1 Stubbs, ch. 2.

³ 1 Stubbs, ch. 2.

then abandoning it and moving elsewhere. This was to prevent accretion of wealth—the greed of the powerful over the weak; to avoid the building of luxurious homes; to prevent avarice and to produce content by equality of condition. In war, chiefs are chosen for merit; in peace, *principes regionum atque pagorum* administer justice and suppress litigation. The *Suevi* (the most warlike tribe) are very aggressive. They have a hundred *pagi* or territorial divisions, each of which furnish a thousand champions; the rest of the population stay at home to furnish supplies. In the next year this is reversed. Here is a picture of the rude, half-civilized, hardy, brave and strong stock, whose outcome promises greatness. It had the element of national independence and power, blended with local division for local rule, and a life which forbade the creation of wealth and the resulting condition of poverty. This was not less than half a century before the Christian era.

§ 70. Tacitus, in his *Germania*, gives a picture of the Teutons a century and a half later. He describes the race as one composed of homogeneous tribes, with the same tongue, religion, physique and institutions. All of pure and unmixed blood. They were pastoral. Money and merchandise were held of little account. They had no cities, but villages of rudely-made houses and with no streets. Their chastity and fidelity to marriage vows, plainness of dress, temperance of habit, are still, as in Cæsar's time, marked characteristics. Love for hunting has declined; indolent habits succeed with some of the vices of wine and gambling. No longer nomadic, they live at farm homes, local organization having increased in strength, and their moral tone is higher than at Rome. They are still largely herdsmen; agriculture has advanced; migratory habits have yielded to fixed habitations and homes of substantial character. Village settlements are permanent. The arable land is occupied by the whole community and is allotted annually to the freemen. Corn alone seems to be produced; still there is growing up the idea of separate property, and land grants become largely prevalent.

There are distinctions of blood and of rank: *nobiles*, *ingenui*, *liberti*, and *servi*. *Nobiles* by descent. The *ingenui* are free and equal to the nobles, except in descent. *Liberti* are freedmen. *Servi* are slaves. The official distinctions: *princeps*, *dux*, *sacerdos*, *rex*. The *princeps* was permanent in dignity and elected in the National assembly, with warlike companions called his *comitatus*. The *princeps* fought for victory — the *comitatus* fought for their *princeps*. There was no central power or federal bond between the tribes in the time of Tacitus. Each tribe had its king elected from the *nobiles*, who were different from the *principes*. A tribe or *civitas* was the national unit, divided into *pagi*. The central power of the *civitas* was in the national assembly of freemen. The *princeps* was there to preside, not to command. This assembly decided on peace and war, elected magistrates for the *pagi* and *vici*, and also acted as a high court of justice. Local courts were held by the elected *principes* in the *pagi* and *vici*.

The *pagus* was a large subdivision of the *civitas* — a canton; the *vicus* was a village, township — *tun*, i. e. inclosed. In these local courts the *principes* presided, but not as judges. There were a hundred assessors who gave the law and decided cases. Each *pagus* furnished a hundred older men (aldermen) as assessors to the court, and a hundred younger men as warriors for the field. These last were led by the *dux*, and the *comitatus* by the *princeps*. Besides these, freemen were arranged in families to fight for home — the origin of our militia force. Tacitus said this last was the strongest. The *pagus* was originally perhaps composed of a hundred families, not necessarily of that number — a germ of the *Hundred*, which was an historic organism in every branch of the German race. The *vicus* was the subdivision of the *pagus* — the origin of the township in Teutonic and English history.

We see in this primitive stage of the race a loose union of compact localisms — a tie of nationality, accordant with distinct and individual political autonomy, and a race ready

on an emergency or opportunity to unite for a common enterprise under great leadership for new fields of life and activity.

§ 71. The Saxons were settled between the Rhine and the Elbe. East of the Elbe were their neighbors, the Angles; north of them were the Jutes. All spoke low German. The Suevi or Swabian tribe spoke high German. These Saxons, Angles and Jutes colonized England in the fifth century. The peculiarity of these tribes will appear from the following considerations. Other Teutonic tribes invaded Gaul, Spain and Italy. The difference between these two invasions is important to be noted for the diverse results of the two.

First. The Teutons who invaded the Celtic countries, Gaul, Spain and Italy, were imbued with Roman and Christian ideas. Those who invaded England had neither; they were pure and heathen Teutons.

Second. The Celtic countries invaded were imbued with Roman and Christian ideas, as were their invaders; hence, the invaders brought a new political and military organization, but coalesced and fused with the invaded people in religion, language and habits. The Teuton invaders became Roman Christians. On the contrary the Britains, who were Celts, had expelled the Romans before the Saxons migrated to Britain, and had no fixed Roman or Christian ideas; and the Saxon heathen invader, therefore, brought his religion of Thor and Odin with his Teutonic habits and customs unaffected by Roman jurisprudence or ideas.

Third. These diverse results were accentuated by the character of the two invasions. On the Continent migration took place overland by hordes of people of all classes, and was a pure migration. It was not accompanied by fierce conflicts for possession. The invaders and aborigines fused in peace.

To Britain the migration was in small bodies on ships and over the sea. The invaders fought for habitation and settlements fiercely and to the point of extermination. They came in separate bands and founded separate seats of power. The male Britain was killed or driven back to Wales or Corn-

wall. The Saxon men alone remained. British women may have intermarried with these Saxon men, and thus mixed the blood of the Teuton and of the Celt. This is perhaps probable, but the main body of those who remained in Britain were Teutonic in language, for it is said only thirty Celtic words remain; Teutonic in religion, and in social and political customs. It was "Germany outside of Germany."¹

An analogy to the continental migration is found in English migration into French Canada and into Louisiana. The analogy to the invasion by the Saxons is that of the invasion by the English of the aborigines of America. In both cases the invaded die or are driven away.

Fourth. Another striking characteristic difference comes from the purpose of migration. A migratory movement of a mass of people to settle without conflict has no heroism in it. But the Saxon adventurers in their rude crafts, cutting loose from home to establish new estates by force of arms in a new land filled with hostile aborigines, is a heroic crusade to plant a new type of civilization on new sites of power. The *dux* who led such an expedition with success might well be the founder of a new state. These adventurers carried with them their commonwealth of institutions and habits. The *civitas*, or tribe, composed of *pagi*, and each *pagus* composed of *vici*, or townships, constituted a form of statehood which was fastened as an institution on the soil of England.

From A. D. 449, the date of the invasion, to 597, the landing of St. Augustine, the Saxon continued heathen, and transformed the political system of his Teutonic home, with its *civitas*, *pagus* and *vicus*, into the Saxon system of shire, hundred and township, which was the Saxon state in Teutonic mould. The epitome of the development of the Saxon organism from the seventh to the eleventh century is thus described by Dr. Stubbs:

"The people occupy settled seats; the land is appropriated to separate townships, and in these certain portions belong

¹ Taine's English Literature, 51.

in entire possession to allodial owners, whilst others are the common property of the community; and there are large unappropriated estates at the disposal of the nation. Each of these townships has an organization of its own; for certain purposes the inhabitants are united by the mutual responsibility of the kindred; for others they are under the authority of their reeve, who settles their petty disputes, collects their contributions to the national revenue, leads the effective men to the fyrd, and with his four companions represents the township in the court of the hundred or in the folkmoot. The townships are not always independent; sometimes they are the property of a lord, who is a noble follower, comes, gesith, thegn, of the king, with jurisdiction over the men of the township, and many of the rights which we associate with feudalism. Where, however, this is the case, the organization is of the same sort; the reeve is the lord's nominee, the moot is the lord's court, the status of the inhabitants is scarcely less than free, and their duties to the state are as imperative as if they were free.

"A cluster of townships is the hundred or wapentake; its presiding officer is the hundred-man: he calls the hundred-moot together, and leads the men of the hundred to the host, or to the hue and cry, or to the shiremoot. He is generally elected, although sometimes the feudal element is all-powerful here also, and he is nominated by the noble or prelate to whom the hundred belongs. He has no undivided authority; he is helped by a body of freemen, twelve or a multiple of twelve, who declare the report of the hundred, and are capable of declaring the law. Nearly all the work of judicature is contained in this, for questions of fact are determined by compurgation and ordeal. The shire-moot is a ready court of appeal, and the royal audience is accessible only when both hundredmoot and folkmoot have failed to do justice.

"A cluster of hundreds makes the shire; its officers are the ealdorman, the sheriff and the bishop; its councillors

are the thegns, who declare the report of the shire; its judges are the folk assembled in the shiremoot, the people, the lords of land with their stewards, and from the townships the reeve and four men and the parish priest.

“The shiremoot is the most complete organization under the system: it is the *folk moot*; not the witenagemot of the shire, but the assembly of the people; in it all freemen in person or by representation appear. Its ealdorman is appointed by the witan of the whole nation, like the princeps of Tacitus; its reeve once, perhaps, elected from below and authorized from above, like the king or bishop himself. The ealdorman leads the whole shire to the host, the sheriff commands the freemen, the lords their comites and vassals, the bishop’s reeve or abbot’s reeve the tenants of the churches, all under the ealdorman as the national leader. The ealdorman and bishop attend the witenagemot; the sheriff executes justice and secures the rights of the king or nation in the shire.

“The union of shires is the kingdom; whether there be two or three as in any of the seven kingdoms, or all together in the kingdom of Athelstan or Edgar. But the kingdom is merely an aggregation of shires, which in many cases have themselves been kingdoms of earlier formation, with the minimum of necessary administration. The king is at the head: the national council is the witenagemot.”¹

This was Saxon England.

§ 72. The ancient Saxon commonwealth may be thus summarily described:

First. The people lived at homes in separate townships — the *vici* of the Germania. Each town has its own organization, with its reeve as their leader, who, with four companions, represents the town in the hundred, or folk moot. The lord or thegn (thane) has something like feudal powers. A cluster of these townships makes the hundred or *wapentake*. This hundred is the *pagus* of the Germania. Wapentake, the name, is supposed by some to be *weapon take*, because there

¹ Stubbs’ Select Charters, pp. 8-10.

the people received their arms. By others it has been held to mean weapon-touching, because that was the mode by which men voted their consent to any measure—touching their weapons; and hence it came to be a district governed by those elected by such a vote. The presiding officer of the hundred was the hundred-man. He summons the hundred-moot, and leads the host to battle, or to the shire-moot. He, with twelve men, declare the report of the hundred as the law. An appeal lay from the hundred-moot to the shire-moot.

Second. A cluster of hundreds makes a shire—the *civitas* of the Germania. Its officers are an ealdorman, a shire-reeve¹ (sheriff) and bishop. The thegns, as councillors, declare the judgment of the shire-moot, which is by the people in the shire-moot comprising the lords of the land, their stewards and the reeve and four representatives, and the parish priest of the townships. The shire-moot is therefore a folk-moot, or the people in their primary capacity with the representatives of the townships. It is not a witenagemot; that is a selected body. The ealdorman leads the whole shire to the host and is appointed by the witan of the kingdom. The sheriff commands the freemen, and lords their vassals and *comites*. All of these are under the ealdorman, who is a national leader. Ealdorman and bishops attend the witenagemot of the kingdom.

Third. A cluster of shires makes the kingdom, which is an aggregation of these localisms. In the Saxon heptarchy, or seven Saxon kingdoms, each was separate and distinct from the others, and each was composed of shires. It seems that the church was the first organic unit of these kingdoms, and as the bishops of the church were more or less coincident with the shires, the church became the source of national unity through its ecclesiastical unit. The witenagemot of the kingdom (the meeting of the wise men) is the legislature of

¹ A. S. *reave*, to tear away by force; hence the reeve derived his name from this power.

the kingdom. It was not a folkmoot, but a body of select representatives, composed of *princeps*, *comites*, *thegns*, *ealdormen* and *bishops* of shires. Dr. Stubbs thinks that the people also had the right to appear in the witenagemot, but they did not. The powers of the witenagemot are very large—to elect and depose kings, to make war and peace, and legislate in conjunction with the king.

Fourth. The king (*cyning*) was the leader of the host to battle. He was not a law giver or the *fons justitiæ*, but with his witan was the law-making power. Towards the close of Saxon history, kingly power had largely increased, and there were marks of feudalism developed in its polity. Mr. Taylor thinks the shires of the seventh century shrank to hundreds in the tenth, and the kingdoms of the former century shrank to shires in the latter.¹

This institutional Saxon commonwealth would thus seem to have been the unity based on local differences and distinct organisms, which thus federatively secured all against foreign foes and the liberty of each in its localized power. This is a foundation stone of Saxon polity.²

§ 73. The Norman invasion in 1066 overthrew the Saxon kingdom at Hastings. William I., the conqueror, brought feudalism with him, and divided the Saxon lands among his Norman nobles, making sixty thousand fiefs, which were held to the king by feudal tenure. His great council, which was successor to the Saxon witenagemot, exercised like powers with the king and was constituted in like manner, but, as the Norman landholders were tenants in chief to the crown, the Norman witan, or Great Council, was composed exclusively of Norman nobles and Norman bishops; no Saxon held a seat in the Council. But a more select body gathered about the king as his councillors in the government of the realm. This body was composed of the chief justiciar, a chancellor, and a treasurer, and came to be called the *aula*

¹ Taylor's *Origin, etc., of the English Constitution*, pp. 193 and 212.

² See a speech of Bismarck, April 16, 1869.

or *Curia regis*, and arrogated to itself large powers and authority.

The Norman nobility, holding the lands in the kingdom by feudal tenure, were vassals of the king but tyrants over the Saxon people. But William the Conqueror showed remarkable wisdom in yielding to the loud clamor of the Saxon people for the laws of Edward the Confessor, who directed a commission to be selected from each shire composed of twelve . . . "*anglos nobiles sapientes et in lege sua eruditos ut eorum consuetudines ab ipsis audiret.*" The collection of laws and customs thus made was thus announced to the realm: "*Istæ sunt leges et consuetudines quos Willielmus rex post adquisicionem Angliæ omni populo Anglorum concessit tenendas eadem, quas predecessor suus Edwardus servavit.*"¹

Thus Saxon institutions and laws survived the conquest and the shire-courts and hundred-moot, and the township organisms were perpetuated. The king gave the shires to a sheriff appointed by himself who held the Anglo-Saxon county courts.² Thus, underneath the Norman despotism, at the head of which was an alien king, who, with his Norman nobility and the despotic and feudal principles of the era, made the tyranny over the Saxon people a fearful example of the fate which follows conquest by a foreign power, there survived enough of the Saxon Constitution for the organization of Saxon liberty to seize every occasion for the restoration of its freedom from the domination of the crown and the nobles.

§ 74. The king, through his *aula regis*, became *fons justitiæ*. The jealousy of royal power by the nobles, and the king's jealousy of the rising power of the great barons, disposed each at critical moments to court the good-will of that great people, who, subject to the tyranny of both, was in such numbers as to furnish the material for the military force of the country. Their power to raise successful oppo-

¹ 1 Reeves' History of English Law, chs. 1, 2, notes, pp. 45, 57.

² De Lolme on the Constitution, p. 18.

sition to kingly and feudal authority was successfully repressed when both king and nobles combined; but when they were antagonistic, each found it expedient to court the good-will of the Saxon people as the source from which armies were marshaled.

It is only by comprehending this condition of things that the continued concessions to Saxon liberty during these centuries after the conquest can be fully understood. Feudalism, though a most odious despotism, presented an opposition to royal centralism — the nucleus of formidable antagonism. And thus each feudal baron, though a tyrant over his feudatories, found himself, when backed by their cordial support, no mean rival of the royal chief. Accordingly, without going into details, the generalization may be ventured that through these rude ages of political conflict the royal and baronial power weakened each other, while they were continually strengthening the power of the people, to which each must appeal in their intestine conflicts. The king checked the barons through the courts, and shire, and hundred, and the barons courted the good-will of the people by lessening their feudal burdens. The people availed themselves of the acts of each of these contestants for supremacy to strengthen their own hands to restore their ancient liberties. Hence, when royal meanness invited contempt, and its tyranny provoked defiance by nobles and people in the person of the despicable John, whose treachery to his brother Richard Coeur de Leon alienated all who admired courage and daring, the barons, backed by the Saxon people, seized their opportunity and extorted at Runnymede, from their miscreant monarch, *Magna Carta*, on the 15th of June, 1215. It is a noteworthy fact that the barons and the people, in their demand for this Charter, appealed to the Saxon laws as the basis for their asserted liberties, thus showing the potential influence of the Saxon element in the construction of the British constitution. This extraordinary paper is the first written formulation of civil rights and political liberties known in English history. It emerged from Saxon institu-

tions, and has ever since been appealed to as the fundamental authority upon all questions of political power and civil rights in the kingdom.

It is true that there had been prior charters by Henry I. and Henry II., but these were less important, and their provisions were embodied substantially in the Great Charter of 1215. In prior reigns, important progress had been made in the establishment and regular administration of courts of justice by itinerant judges, who held local courts in the shires for the settlement of revenue questions, with the sheriff of the shires, in which settlements all distinctions between Norman and Saxon people entirely disappeared. So orderly had the judicial system become, that Chief Justice Glanville, in the reign of Henry II. (1154 to 1189), wrote his work on the Common Law, in which the decisions of the courts were referred to in large numbers. So that a regular system for the administration of justice between man and man, so essential to liberty, was established in the latter part of the twelfth century.

During this period, also, cities and towns had obtained free charters from the crown for local self-government. These cities were, in the middle ages, on the continent of Europe as well as in England, valuable *nuclei* of local power over local rights against the force of centralism. All of these events culminated in the Great Charter, of which an analysis will now be given.

§ 75. Leaving out of the consideration a great many important provisions, which relate to ancient feudal polity no longer of practical importance in the historic review we are now making, reference may be had to the following provisions:

The 7th chapter secured the ancient and immemorial right of the widow to dower and to quarantine.

Chapter 9 provided that the land of a debtor should not be seized for a debt due to the king, nor to any one else, as long as the personal property of the debtor sufficed to satisfy it.

The 12th chapter provided that no scutage or aid should be exacted in the kingdom, unless by the authority of the Common Council, except for the redemption of the royal person, etc. This secured the people against royal taxation, as well as against any except that levied by the legislative power of the Common Council.

The 13th chapter secured all the liberties and customs to the City of London, and to other cities, berges, etc.

The 14th chapter provided that the General Council should consist, first, of bishops, archbishops, abbots, earls and great barons; second, of tenants in chief elected in shiremoot through the sheriff and bailiff.

Chapter 17 removed a great popular grievance by making the Court of Common Pleas, in its jurisdiction of questions between man and man, a court fixed to a certain locality, and not to follow the person of the king "*ubicunque fuerimus in Anglia.*"

The 18th chapter provided that certain judicial proceedings, "*recognitiones de nova dissaisina de morte antecessoris et de ultima presentatione,*" should not be taken, except in their counties, by two judges for each county, four times a year, who, together with four knights of each county elected by the county, should take the assizes aforesaid in the county, and at a time and place in the county.

The 28th, 30th and 31st chapters are limitations upon the power of taking private property for public use, or for the use of the public, declaring that no public officer should take the property of any one, unless upon immediate payment therefor, or with the will of the owner.

The celebrated 39th chapter may be thus translated: "No free man shall be arrested or imprisoned, or disseized, or outlawed, or exiled, or in any manner destroyed, nor will we proceed against him, or put burden upon him, except by the legal judgment of his peers, or by the law of the land."

The 40th chapter declares, "Right and justice we will sell, deny, or postpone to no man."

In the 61st chapter is a most remarkable declaration, which may be thus translated: "And we will cause nothing to be

done by any one, either by ourselves or by any other person, by means of which any one of these concessions and liberties shall be revoked or diminished, and if any such thing may have been caused to be done, let it be held null and void, and we will never make use of it by ourselves, or by any one else."

The 63d chapter has this sweeping declaration: "Wherefore it is our will and fixed precept, that the Anglican church be free, and that men in our kingdom for themselves and their heirs forever have and hold all the aforesaid liberties, rights and concessions well and in peace, freely and quietly, fully and intact, from us, and our heirs, in all things and places in perpetuity, as has been before said."

§ 76. It is then clear from the terms of *Magna Carta* that it was a fundamental constitution in writing between the king, the baron and the people, by which certain rights and limitations of power were unchangeable and forever fixed as a part of the polity of England. It not only declares, as we have seen, that the liberties, etc., shall be held in perpetuity, but that anything done contrary to *Magna Carta* shall be held to be null and void. This is the germ of the American doctrine, to which we have already adverted, that the Constitution is the supreme law of the land, and all pretended laws and acts of government, contrary thereto, are null and void (*irritum et inane*).

In the Charter of Henry III., where this Charter was renewed, there will be found in the thirty-fifth chapter a special provision confirming the old Saxon county courts, and a provision limiting holding of property by corporations, which has the germ of all subsequent mortmain legislation.

We may now summarize the results of the conflict between Norman power and Saxon institutions from William I. to John, as follows:

First. Saxon institutions stood their ground with the Norman graft of feudality upon them.

Second. The grand jury and jury system arise out of the selection of recognitors from the hundreds to inform the Crown as to criminals, etc.

Third. When an aid (tax) was decreed by the Grand Council (Parliament), the collection was left to sheriffs of counties and the officers of the Exchequer. The towns and counties were assessed with their respective shares, and the distribution of the burden in detail upon individuals was, under Henry II., made by a sworn body of knights, or lawful men of the venue. In this adjustment of taxation exacted from a shire or a town by the representatives of the locality between the individuals who resided therein, is the germ of local power in the matter of taxation.¹ The same procedure as to the tax on lands had been applied in the time of Richard I.;² and in his time all county officers, such as coroner and others, were made elective, and the selection of the grand jury was in the same way.³

Fourth. The power of the Grand Council in matters of taxation was fully recognized in *Magna Carta*.

Fifth. The English Body-politic *de facto* was a Norman king, Norman lords and clergy, and the Saxon people.

Sixth. Cities, towns and boroughs were increasing in number under royal charter, as *nuclei* of popular independence and power.

Seventh. The Norman clergy was not in sympathy with the Saxon people. The Norman king was not under fealty to the Pope. The Saxons, as a mass, were not in sympathy with the Pope, whose intervention in favor of William at Hastings made them unfriendly to him.⁴

Eighth. *Magna Carta*, in 1215, was the written Constitution for the Realm of England, fixed and supreme.

Ninth. Prior to *Magna Carta*, John, November 7, 1213, issued a summons for a parliament, in which he directs the sheriff of each county to "summon four discreet men of your county to come to the general council at Oxford, *ad loquendum nobiscum de negotiis regni nostri*." This may be regarded, says Dr. Stubbs, as "the first instance of the sum-

¹Stubbs' Select Charters, pp. 25, 26.

³Id., pp. 27, 28.

²Id., p. 27.

⁴Thierry's Norman Conquest, Bks. 3 and 4.

moning of the folk-moot to a general assembly by the representative machinery already used for judicial purposes.”¹

§ 77. The Thirteenth Century, beginning with John and ending with Edward I., is a new era in English history — the vestibule of the English Constitution.

Henry III. (1216 to 1272) was devoted to foreign influence and allied himself with the papacy against the National Church, and though he confirmed *Magna Carta*, yet he violated it so flagrantly that at last he provoked a rebellion under Simon de Montfort, Earl of Leicester, who, trusted by clergy and nobles, at the head of the barons, seized power, and on the 14th of December, 1264, issued writs for a parliament, in which he summoned barons and ecclesiastics, two knights from each shire, and two burghers from each town.² This is recorded as the first popular representation in Parliament; certainly the first time the shires and towns were called.

The royal power of Henry III. was restored after the death of Leicester on the field of Evesham, by general peace in 1267. During the reign of Henry III., Bracton had published his great work on the Common Law, containing the legal decisions in the English courts, with the refined and expanded principles of the Civil Law. English jurisprudence had thus laid its solid foundations in the written works of Glanville and Bracton before the accession of Edward I.

On the death of Henry III. in 1272, Edward I. ascended the throne. He had the experience of his father to guide and to warn him. Sir Matthew Hale has called him “the English Justinian.” During his reign the law was defined, the judiciary was organized, and the first organization of the three estates of the realm into a representative parliament was accomplished. The Grand Council had been composed of barons and ecclesiastics. It was needed to make it also the third representative of the third estate of the realm — the

¹ Stubbs' Select Charters, pp. 286, 287. ² Stubbs' Select Charters, p. 415.

Saxon people. They had been, as we have seen, summoned by John in 1213, and by the Earl of Leicester in 1265. The shire-moots, or people's body, was already part of the political system. John had summoned the knights of the shires "*ad loquendum nobiscum*," etc. Taxation had been upon the shires and boroughs; the distribution and collection of each burden had been already a matter for the jurisdiction of the shire-moot and the borough. The same was true as to the quota of tax assessed upon the clergy. Taxation thus dealt with estates of the realm and not with men.¹

In 1272 and 1275 Edward summoned knights to Parliament; but Dr. Stubbs thinks that knights were chosen to Parliament by shire-moot and burghers by boroughs permanently only at and after 1295. This year, therefore, may be regarded as marking the era of the Commons as a permanent estate of the realm, and they were summoned by Edward "*ad faciendum*," and not merely "*ad loquendum*" (that is, to enact, and not merely to speak).² Let it be observed that the election of representatives was in the shire-moots—in that Saxon localism, composed of its clusters of hundreds, and each hundred of its clusters of townships; so that the shire was a state of the realm.

When the Commons sat in a separate body from the Lords and Ecclesiastics is not accurately determined. Dr. Stubbs thinks they did so as far back as 1295, though the first record of their sitting in a separate chamber he makes to be 1332.³ Certainly in the time of Edward IV. the Commons were summoned "*ad consentiendum et faciendum*" (*i. e.*, to assent to and enact). In the 15th of Edward II. it was declared that all things must be done "in Parliament by king, and by assent of prelates, earls, barons and commonalty of the realm, according as it has been hitherto accustomed." And as early as "the 3rd of Edward I. the Great Council of

¹ Stubbs' Select Charters, p. 38.

Constitution, p. 60, note; Guizot's Representative Government, lec-

² Id., p. 486.

ture 17.

³ Stubbs' Constitutional Hist., ch. 16, vol. II. Also, De Lolme on the

the Nation is called the 'Parliament,' and the statutes of that year are by the assent of the 'Arch-bishops, Bishops, Abbots, Earls and Barons, and all the commonalty of the Realm.'"¹

As soon, therefore, as the Commons sat in a separate body, the Parliament became bi-cameral, and the Commons sitting in distinct chamber fixed the principle of concurrent majorities of the House of Lords and of the House of Commons as to legislation, including taxation. This fixed the power of the Commons in the matter of taxation forever, and made no tax and no legislation possible except by their concurrent assent. This based all legislation, including taxation, upon the concurrent majorities of the two Houses.

§ 78. In the thirty-fourth year of Edward I. (1306), the act "*De Tallagio non Concedendo*" was passed, in which the following fundamental declaration was made:

"*Nullum tallagium vel auxilium, per nos, vel haeredes nostros, de cetero in regno nostro imponatur seu levetur, sine voluntate et assensu communi archiepiscoporum, episcoporum et aliorum praelatorum comitum, baronum, militum, burghensium, et aliorum liberorum hominum de regno nostro.*"²

During this reign *Magna Carta* was confirmed eleven times, showing the firm establishment of its principles and of the other acts as part of the permanent constitution of the realm. Liberty was progressive. And in the twenty-fifth year of Edward I., it was declared that "No manner of aids, tasks or prizes should be taken except by the common assent of the realm."³ Several other statutes were passed in this reign which are too important to be omitted. Among these may be mentioned the statute "*De Donis*," which created entails (in the interest of the nobles), and the statute of "*Quia Emptores terrarum*," favorable to tenants, and the statute of "*mortmain*," which was a check upon the corporate and ecclesiastical power.

¹ De Lolme on the Constitution, pp. 59 and 60, notes.

² De Lolme on the Constitution, pp. 28, 29, 30, and note.

³ Id., pp. 30, 31, and note.

During this reign, too, Edward I. divided the judiciary into four courts: King's Bench, Common Pleas, Exchequer and Chancery; and "*Nisi prius*" courts, conducted by itinerant judges, were constituted in 1285. The county courts were well defined, and confirmed as a part of the judicial system. The jury system was also improved. Thus, two centuries and a half after the conquest, the conquered Saxons, by tenacity to their primal institutions, took and held the vantage ground against their Norman conqueror.

The results of this reign may, therefore, be thus summarized: The Commons were made a separate estate of the realm, and the principle of concurrent majorities was established; representation and taxation were correlated, and thus wedded power to right; a regular judiciary in and near the homes of suitors was established; and the liberty of person and property declared by *Magna Carta* was conserved by the independent power of the Commons. The reign of law and constitution was firmly established under the "English Justinian."

Edward made the government of the kingdom a government of these distinct estates or orders of the realm, in which the kingly power was large in the claim and use of prerogative. The House of Lords — the true successor to the Saxon *Witan* — was filled with Norman nobles and prelates, and the House of Commons — the third estate of the realm, representing the Saxon people in their several shires — had its equal place along side of these others. Each shire was a corporate entity — the *quasi* body politic — in fact a former kingdom, now a shire and a federate member of the union of shires.

Henceforth the House of Commons claimed taxation as its undoubted right, initiated tax bills, and as early as 1309 attached to bills granting money to the Crown, petitions for the redress of grievances under which the people suffered; and later on made redress of grievance a consideration for, and then a condition to, the granting of subsidy. This be-

came so marked in the action of the House of Commons, that in the time of Charles I. the Speaker of the House of Commons said, "Grievances have been first considered before supply." Besides all this, the House of Commons claimed a right to impeach officers of the Crown, and the power to scan appropriations as well as to originate taxation.

§ 79. As early as 1330, the Parliament, following the constitutional right of the Saxon *Witan*, deposed Edward II., and in 1400 deposed Richard II. At a later date, Edward IV., of York, held that the York kings were *de jure*, while Lancaster kings were *de facto*, because the former claimed by hereditary title, the latter under act of Parliament. In the reign of Edward II., "year-books" began—the regular and annual reports of the decisions of the courts settling the law upon judicial foundations. The art of pleading was growing in precision and judicial action became regular.

During the warlike reign of Edward III., there was a growing jealousy of the church and of the papacy. Acts of *praemunire* forbade appeals from any home court to the Pope, or any foreign tribunal. The celebrated law of treason, defining that crime precisely, and excluding constructive treason, was passed, and is the prototype of a like provision in the Constitution of the United States.¹ Annual parliaments were provided for by law in the fourth year of Edward III. Court procedure was required to be in the English and not the Norman language (36th of Edward III.). County Courts were to be held four times a year, composed of Justices of the Peace (36th of Edward III.). Trial by jury was greatly strengthened.

In the reign of Richard II., John Wycliffe, the prototype of Martin Luther, translated the Bible into the Saxon language. He had a great following among the people. These followers were called "Lollards," a contemptuous expression used by the members of the established Church. These people, the followers of the reformer, were greatly perse-

¹ Const. U. S., Art. III, § 3.

cuted. The Commons, largely in sympathy with these heretics, resented this action with indignant remonstrance. So that in the fourteenth century, the struggle between the Papacy and the reformers began—one hundred and fifty years before the outbreak of Luther's reformation.

The chancery, however, grew in force, despite the jealousy of the House of Commons. The House of York, under Edward IV., broke in large degree the power of the Commons by restricting suffrage, but the last of the house of York, whose claim to the Crown was *de jure*, was overthrown in 1386 at Bosworth field by the Earl of Richmond, who, upon the death of Richard III. at that great battle, ascended the throne as Henry VII.

These facts go to show the conflict between the *de jure* prerogative of the Crown and the self-assertion of power by the Saxon commons. The struggles between the barons under the rival Houses of York and Lancaster broke down their wealth and power. The Saxons rising in wealth and self-assertion and educated by the great reformation of Wycliffe, Tyndale, and the like, were consolidating their power and influence by an advance from poverty to ownership of lands.¹

§ 80. Upon the accession of Henry VII. to the throne in 1486 a new era is at hand—modern history begins. The art of printing, the invention of gunpowder and the mariner's compass had become the material instruments of a higher progress. Columbus was dreaming of a new world; Copernicus of a new heaven. Galileo in the next century is to find new forces in the Universe. Luther, in prattling infancy, is growing up to the stature of the Archimedes of the Reformation. The Roses, once at war, bloom together on the stem of the House of Tudor. The close of the fifteenth century is the prelude to that which opened with Henry Tudor and closed with Elizabeth—a century of religious strife that convulsed Europe. The Reformation, anticipated, as has been seen, by Wycliffe, Tyndale, and others,

¹ See a splendid picture of this era in Bulwer's "Last of the Barons."

had deep hold upon the Saxon race in England, and enlarged and strengthened the principles of religious and civil freedom, the seeds of which, in the early part of the seventeenth century, were planted in the virgin soil of the American continent. Let us trace the influence of this new and wonderful force in civilization upon the cause of constitutional government in England.

§ 81. Mr. Hallam¹ has stated with great precision and comprehensiveness the status of the English Constitution in these words:

“The essential checks upon the royal authority were five in number: 1. The king could levy no sort of new tax upon his people except by the grant of his Parliament, consisting as well of bishops and mitred abbots or lords spiritual, and of hereditary peers or temporal lords, who sat and voted promiscuously in the same chamber, as of representatives from the freeholders of each county, and from the burgesses of many towns and less considerable places, forming the lower, or commons’ House. 2. The previous assent and authority of the same assembly was necessary for every new law, whether of a general or temporary nature. 3. No man could be committed to prison but by a legal warrant specifying his offense; and, by a usage nearly tantamount to constitutional right, he must be speedily brought to trial by means of regular sessions of gaol-delivery. 4. The fact of guilt or innocence on a criminal charge was determined in a public court, and in the county where the offense was alleged to have occurred, by a jury of twelve men, from whose unanimous verdict no appeal could be made. Civil rights, so far as they depended on questions of fact, were subject to the same decision. 5. The officers and servants of the crown violating the personal liberty or other right of the subject might be sued in an action for damages, to be assessed by a jury, or, in some cases, were liable to criminal process; nor could they plead any warrant or command in their justification, not even the direct order of the king.”

¹ Constitutional History of England, ch. I, p. 2.

It is interesting to note how these principles of constitutional liberty resulted from the conflicting elements of which English society was composed; for liberty in all history has emerged from conflict.

The first conflict was that of two powerful races — the Norman and the Saxon. Each jealous of the other and contending for pre-eminence. One of these races was devoted to Teutonic institutions fixed firmly in their own country by six centuries of usage, and in their local organisms of power, the shires, hundreds and townships. Against these inherited institutions, the Norman king, baron and clergy fiercely contested for supremacy. Then again the popular religion of the Saxons was jealous of the foreign Norman priesthood and of the Pope, who had thrown the weight of his bull of excommunication on the side of the Norman conqueror. Then again, there was the conflict of the civil with the common law — the tendency of the Norman secular and ecclesiastical power being favorable to the civil Roman law they had brought with them, and the Saxon struggling for his home law in the institutions of the Saxon commonwealth.

Out of these fierce conflicts, in which every inch of ground was contested, grew the Constitution of the kingdom, where each estate of the realm found its independence and distinct organism, without the concurrence of all of which no action was possible. These contesting elements thus became the *nuclei* of distinct interests, each one of which found its representation in some branch of the governmental machinery, and secured the protection of each by requiring the concurrence of all to governmental action.

One other statement is necessary. The insulated position of England gave liberty a great advantage, because standing armies were not necessary for protection against neighboring nations, as was the case on the continent of Europe; standing armies being the pretext of despotism as a means of defense against foreign foes to be used in the suppression of the liberty of the people.

The wars of the Roses, moreover, had destroyed the men of the nobility and wasted their wealth. Of fifty-three temporal barons in the time of Henry VI., only twenty-nine were of age in the time of Henry VII.¹ Along with this waste of baronial wealth, the Saxons by thrift and industry had acquired great riches, bought the lands which the nobles were compelled to sell, and acquired a landed influence which is always potential in the support of political power.

Though Henry was despotic and arbitrary, yet Mr. Hallam says: "When general subsidies were granted, the same people, who would have seen an innocent man led to prison or the scaffold with little attention, twice broke out into dangerous rebellions." The Commons clung during his reign to the money power with great tenacity.²

The reign of Henry VIII. was one in which royal prerogative was pressed to its extreme limits. The insolent tyranny of Cardinal Wolsey produced fierce conflicts with the Commons, who showed great reluctance to the grant of taxes, and resort was had to compulsory benevolences. These were met with bold outbreaks against the royal agents, and the power of the king yielded in some degree to them; but a new element in constitutional history enters into the problem in this century and during this reign. Martin Luther burned the papal bull at Wittenberg on the 10th of December, 1520. This was the fire of the Reformation which spread throughout Europe. From this time to the final establishment of the constitutional monarchy in 1688-89, the influence of the reform movement upon the constitutional history of England was paramount. The civil and religious elements combined in irresistible force to curb the royal power, and to give paramount influence to the will of the people in England.

It is not intended to consider this question in large detail, but to collate the main facts which conduced to this beneficial result.

¹De Lolme on the Constitution, p. 37, and note.

²Hallam's Constitutional History of England, p. [18].

§ 82. The history of free institutions before the Christian era was not hopeful for their permanence and stability. This arose from the fact already referred to, that the nation was but an enlargement of the patriarchy which generated and perpetuated the *patria potestas* of the family. The State was all — the man was zero. It required a new principle to remove this pall of servitude which hung over the human race. The germ of modern free institutions is in the personal consciousness of the individual man that he is a creature of God, with responsibility to Him for self-use of his God-given powers, and that to work out his personal destiny upon this personal accountability to his Divine King, he needs to be free from the restraints with which despotism would bind his body, mind, heart and conscience. When man has this idea planted in his soul, it becomes a moral force which dreads treason to the Almighty Sovereign more than all the threats of human authority, and makes “resistance to tyrants obedience to God!”

Christianity furnished, as no other form of philosophy or religion has ever done, this impelling motive to human consciousness. It roused man from the torpor of insensibility as to his true relations with God and his fellow-men, to a quickened conscience and a profound sense of his individual and infinite responsibility; and then to a brave self-assertion of his right to liberty, as essential to his duty to God in working out his awful and sublime destiny.

This new inspiration for the human soul has made modern civilization. All philosophic speculation, whether it bows with religious reverence before the founder of the Christian system, or rejects its divinity, must concede this; and it may be assumed without further discussion. The result of this new motive in man under the inspiration of Christianity makes the contrast between the governments of ancient and modern times striking and instructive.

Even in the ancient republics, as signally in their monarchies, the state (*πόλις*) was everything, the man but a fraction of the mass. Their republics transferred power from

the one or the few to the many, but the many were prone to overlook the rights of the man in achieving the advancement of the State. Glory for the Nation was always preferred to the liberty of the man. In modern times the man, in his deep consciousness of personal duty and infinite destiny, has asserted liberty as his right against all human authority. Ecclesiasticism was broken before the revolt of the Reformation, and kings, on the block or in exile, have yielded to the boldly asserted freedom of the man; and power has been claimed for the people in order to this liberty of the man.

Hence it is obvious, that when the religion of the government differs from that of the people, a struggle must result between invaded conscience and the powers that be. Power may touch the man's life, property and family; his respect for the government *de facto* and social order may lead him to submit; but touch his awakened conscience, invade his soul, put manacles on his conscience,—cut off the avenue of union between him and his Maker,—make him renounce the faith which binds him to the Cross of the Divine Author of his origin, and you arouse a power which the ancient world never knew,—which Christianity has alone created, and compel a popular resistance to the orders of government which are in conflict with the conscientious convictions of the man.

This will illustrate the temper generated in the heart of the people by a religious faith, which has such muniments of title—such foundations for its creed, as those which Christianity presents. The man will welcome martyrdom to avoid apostasy, and, to save the crown of his Celestial King, will strike down the throne of his earthly monarch. He cannot obey the order of a human king against the commands of his Divine Sovereign. Loyalty to a crowned head becomes treason to God.¹

What would have been the result of the Reformation upon the English constitution had the court and people been at

¹ Taylor's Origin, 597-98; Fiske's 42-44; Hallam's Constitutional History of England, ch. 2.

one, as in France and Spain, it is needless to inquire. It would at least have made the result doubtful.

But the circumstances in England were peculiar. When Luther burnt the papal bull at Wittenberg, England was papal as to Crown, and the people were divided. But, as already indicated, the seeds of the Reformation had been sown one hundred and fifty years before Luther burned the papal bull, by Wycliffe and his disciples. His followers were opposed and persecuted in former reigns. Their zeal, strengthened by persecution, created such a numerous and powerful band of dissenters that we are told that one of the bishops declared, "That the London juries were so prejudiced against the Church that they would find Abel guilty of the murder of Cain."¹

Why the Saxon people were inclined to follow Wycliffe and his teachings against the Papacy may be learned from authentic facts stated by Thierry. The Norman invasion was largely aided by the Pope in his excommunication of Harold, the Saxon king, and his adherents, and by the authority given to William the Conqueror to invade England and bring her back to obedience to the Holy See, and to re-establish there the tax of St. Peter's pence.² The Saxon people could not fail in their hearts to attribute the ruin of their commonwealth to papal intervention, and in the homes of the Saxon people there would necessarily be a feeling of hostility to the Holy See, whose powerful aid had accomplished the ruin of their commonwealth. Besides this, the Saxon priesthood were superseded by Norman ecclesiastics.³ So that among the clergy and the laity of the Saxon people there was naturally a fierce, though it might be suppressed, hostility to the Norman power in church and in state.

This temper of the Saxon mind made them ready listeners

¹ Hallam's Constitutional History of England, p. 44.

² Thierry's History of the Norman Conquest, p. 159.

³ Thierry's History of the Norman Conquest, pp. 320-21; Hallam's Constitutional History of England, ch. 2.

to the anti-papal doctrines of the English reformers, Wycliffe, Tyndale and others; so that for a century and a half before the outbreak of the Reformation in Europe, the mass of the Saxon population in England were prepared to adopt the principles of the Reformation as they were announced by Luther.

When, therefore, Henry VIII. published his answer to Luther, and assumed the position of champion for the papal See, he divided the nation. While he was sustained by the old adherents of the church—clergy as well as laity—he created deep-seated hostility in the hearts of the heretics, the mass of whom were Saxons. All the spirit of that race—its love for its ancient institutions—its hostility to the Norman king and barons, were intensified by the fierce current of zeal which religious sentiment poured into the flood of hostility to the crown. The king purposed to absorb in himself all temporal power; and to this end strengthened the Star Chamber, that terrible tribunal which registered the royal edicts as judgments, and put life and property under the royal heel. This despotic tribunal had long existed, but his predecessor and himself gave it greater potency by its arbitrary cruelty—and put all departments of the state in subjection to his will. The judiciary held office *durante bene placito*. Human liberty could only appeal to the courts for protection, but as they were subservient and dependent upon the crown, the safeguard of liberty became a fatal engine of tyranny.

The barons were broken by continual war; their wealth diminished, and the Commons were intimidated. The king absorbed all power, except that reserved power of a liberty-loving people, which awaited its opportunity to overthrow what, for the time, it feared to attempt. The case seemed hopeless. But Henry tired of Catherine and asked the pope, whose authority he had maintained against the apostasy of Luther, for divorce from her. His Holiness refused. The “Defender of the Faith” became the enemy of the Roman

See from the moment it refused to yield to his illicit purpose. But Henry, while breaking with the Pope, did not yield to the Reformation. He held to the doctrines of the Papacy, which the reformers discarded, while overthrowing papal supremacy, which Catholics recognized.¹ His action, however, introduced in England the heretical books of the continental reformers, and, by throwing the weight of royalty against that of Papacy, a great impetus was given to the Reformation movement in England.

§ 83. But Henry was not a religious reformer. He looked to self-aggrandizement, and consummated his ecclesiastical policy by two great changes:

First. The supremacy of the king in the Church of Christ.

Second. The abolition of many of the monasteries and confiscation of their properties to the royal fisc.

The effect of the first was to reduce all clergy to entire subjection to the crown, but its counter-effect was more powerful; it transferred to the crown all the hostility the religious reformers had dealt against the Church of Rome. It is obvious that church and state—the double-headed autocracy, ecclesiastical and political—presented a double-headed object of hostility to the followers of the Reformation. For the religious element in Great Britain, like that of the Scotch covenanters, was not only against the headship of the Pope in the Church, but *a fortiori* against the king as the head of the church. The formula of the Scotch Church was briefly expressed: “Christ is head of the Church.” Therefore they held that no other human headship, even St. Peter, was to be tolerated, and for a stronger reason that Cæsar was not, and could not be, the head of Christ’s Church. Hence the covenanters of Scotland and the reformers of England were more bitterly hostile to the union of Church and State, under the royal headship, than to the supremacy of the papal See. The only reformers who adhered to the royal headship in the Church were

¹ Hallam’s Constitutional History of England, pp. 36, 37.

those who left Rome with Henry and were dependent on him for the holding of their living.

§ 84. This summary of facts is intended simply to show that the action of Henry, which for the time largely increased his power, by combining in himself ecclesiastical as well as civil supremacy, raised against this double-headed power a double-headed opposition. For the Commons of England were composed of two classes: the intensely religious and the non-religious (not irreligious) elements. The religious reformer cared less for civil than religious liberty; the non-religious more for civil than for religious freedom. But each saw his long-cherished right involved in that of the other. The despotism which trampled on the one could as well destroy the other. Oppression made them one; it produced the Hampdens of a later century. Had Henry defied the Pope, and not transferred the tiara of the See to his royal head, the Reformation might have rallied to him; but in assuming for the crown the papal headship he diverted the fierce enmity of the Reformation from the Pope to himself.

In the second measure above mentioned — the abolition of monasteries and confiscation of their property — the king gained great advantage over the people. It made him independent of the Commons for grants of money by pouring the treasuries of the monasteries into the royal coffers, and, by the grant of the wealth and domains of the See to the clergy of the Church, the Crown put the Church at its feet.

But we are told that the Commons bought the lands of the monasteries exposed for sale, — for the Saxon by his thrift had accumulated wealth. The nobles were poor, and thus the Saxon Commons obtained a foothold upon the land of the realm.¹ The clergy, by becoming the dependent pensioners of the throne, diminished their own self-respect and brought upon themselves the hatred which attached to the king, and

¹ De Lolme on the Constitution, p. 60, and note.

thus the reformers arrayed themselves in fierce phalanx against the Church and State.

In the short reign of Edward VI., the Reformation was strengthened by the council of Cranmer and Ridley, who organized the Church upon the basis of the spiritual supremacy of the king, to which many reformers objected. During his reign, and the succeeding ones of Mary and Elizabeth, the rising spirit of the Commons was checked by the inauguration of a system of rotten boroughs. These boroughs, under the control of the crown and nobility, checked the power of the real representatives of the people in the House of Commons, and undermined the integrity of that house, which was the great resistant to the power of the crown. It is thought, however, that the reform doctrine made real progress during the minority reign of Edward VI.¹

§ 85. At the death of young Edward, Mary ascended the throne in the year 1553. She was a bigoted papist, and married Philip of Spain, a papist in religion and a despot in politics, who was trained in the despotic principles of continental monarchy. Like Louis XIV., he would have said, "*L'état c'est moi!*" Her reign, therefore, accelerated the rebellion. To dam a torrent may temporarily check a flood, but unless firmly fixed such a temporary check will surely be followed by disaster.

The measures of the reign had two palpable effects:

First. All the Protestant clergy, whose places in the establishment were filled by papist successors, were thrown into sympathy with the non-conformists as never before. They had suppressed a similar overthrow; antagonists before, they now combined; and as the reign was too short (five years) to extinguish Protestantism, tyranny only checked it for a moment to make its current stronger thereafter.

Second. The queen surrendered her ecclesiastical supremacy to the pope, which many non-conformists preferred to the spiritual supremacy of the crown; but she placed beside her upon the throne of England one of the most despotic of a

¹ Hallam's Constitutional History of England, p. 68.

despotic race, and he a foreign king. Alien in race—alien in institutions—alien in religion—how could Englishmen endure it? Shall Spain rule England? Shall the Reformation be extinguished by the Spanish inquisition? In the fierce answer which Saxon Protestants gave to these questions, it is readily seen that the fires of religion and patriotism would glow together in preparing for the conflagration of the seventeenth century. •

§ 86. At the death of Mary in 1558, the nation rebounded to its Protestant position, and hailed with enthusiasm the accession of Elizabeth, the daughter of Anne Boleyn, one of the most extraordinary women who ever sat upon a throne. She was an arbitrary Tudor. She loved power and used it without limit; but with all her faults, hers was a great reign. Under her sceptre England sent forth her sea-kings, who braved the deep to extend her empire. Her navy grew into paramount strength, before whose prowess and the tempest of God the Spanish Armada dissolved upon her shores. Her reign was the era of Spencer and Shakespeare—of Bacon and Coke—of Raleigh and Blake. Liberty, despite her arbitrary sway, rose into bold debate and self-assertion during her reign. The balance between contending factions she held with marvelous skill, and dying, left a kingdom powerful abroad and more free at home than any other in Europe.

The temper of debate in the Commons was bold and sometimes turbulent; sometimes incurring rebuke from her Majesty for the temper displayed; but her fidelity to Protestantism reconciled them to her arbitrary exercise of civil power, and the rebellion was postponed, because the religious element in the movement was contented with her Protestantism. She never married. No descendant of Henry VIII. could succeed her. The heir-apparent to the throne was Mary Stuart of Scotland,—a bigoted papist, who had drawn from her mother's breast the spirit of continental despotism.

A successful rebellion in Scotland had made Mary fly to the protection of her cousin, Queen of England. It is needless to go into the facts which preceded and attended

the trial of the unfortunate refugee. No doubt a hard measure of justice was accorded her in the trial to which she was subjected, but when her head fell from the block the English people were reconciled to the result, because it saved them from a civil and religious convulsion, which must have succeeded her accession to the throne. It is not too much to say that the pronounced loyalty of Elizabeth to the Reformation suppressed all revolutionary movements during her reign, and left it for the fated house of Stuart to meet with death and banishment the verdict of the English people against the unlimited prerogatives of the crown and the religion of Rome.

§ 87. In 1603 James VI. of Scotland, son of Queen Mary, succeeded to the throne of England as James I., and thus through the union of the people of the two countries under one king brought them into close sympathy in the struggles of the era.

"The Presbyterian clergy," says Mr. Hallam, "individually and collectively, displayed the intrepid, haughty and untractable spirit of the English Puritans."¹ The Puritan was generally independent, but there was great uniformity of creed between the Scotch Presbyterian and the English Puritan; they were alike in their abhorrence of papacy, and of any headship in the Church but that of Christ. The action, therefore, of the king was watched with equal jealousy on either side of the Tweed, by the Covenanters and the Puritans. Any royal blow against one was felt by the other, and a revolt by either against the arbitrary conduct of the king in any religious matter would be aided by the other.

Besides, neither Puritan nor Covenanter ever had much faith in the sincere Protestantism of the son of Mary, Queen of Scots. Accordingly a spirit of proud and turbulent inquiry into the conduct of his Majesty marked the annals of his reign.

James I. was a learned pedant, lacking in boldness and strength of character. It is not, therefore, strange, that

¹ Hallam, *Constitutional History of England*, 123.

when in the place of a great woman, with the courage which feared nothing and a tact which successfully and skilfully avoided rupture, the Commons came into contact with a garrulous pedagogue,—who fain would wound, was yet afraid to strike,—they should assume such an air that James said, when their committee waited on him: “Set twelve chairs for these twelve kings!” Nor is it strange that the Commons, who had emerged from the century of the Tudor dynasty with increased power and influence, should look upon this alien king, with his continental fancies of despotic rule, drawn from the House of Guise with his mother’s blood,—should look upon this son of the beheaded Queen as a foe to their liberty, scarcely a friend to their religion, and a king educated in views hostile to their constitutional policy.

§ 88. Charles I. succeeded to the throne in 1625. He was an abler man than his father; had more nerve, more moral force. He had been educated and believed in the *jus divinum regum*. He knew nothing of the true spirit of *Magna Carta*, and scarcely concealed his contempt for it. He was an alien to the race which for ten centuries had maintained its traditional liberty in this land he was called to rule—a race which had held with tenacity to its institutions, even against the Norman conqueror. Meantime it had imbibed Bible teachings from Wycliffe and his followers, and was decided in opposition to the papal power. Charles derided the doctrines of personal liberty—the sacredness of property under *Magna Carta*, and claimed the prerogative of taxation in some respects against the established authority of the Commons. He resorted to many devices for raising money without resort to the Commons.

The controversy between the Crown and the Commons culminated in the Parliament of 1628. The Commons in that year presented to the king the celebrated petition of right, in which they stated, with precision and boldness, the controverted questions between prerogative and liberty—between the royal power and that of the people. The famous document recited the statute “*De Tallagio non Concedendo*,”

and the statute of the 25th year of Edward III., against compulsory loans; the great 39th Chapter of *Magna Carta*, and the confirmation of it by statute in the 28th of Edward III., and then recited that the king had, in violation of these fundamental statutes, imprisoned men without warrant of law; tried and executed others by court-martial, and had compelled loans from the people, and punished those who refused, contrary to the principles of the Constitution. The petition then prayed his Majesty that it should be declared that no gift, loan or benevolence, tax, or such like charge, should be compelled, without the common consent by act of Parliament; and that no freeman should be imprisoned or detained contrary to *Magna Carta*; that the commissions for proceeding by martial law be revoked and annulled, and that none other of like nature may thereafter issue; that these established rights and liberties of the people should be firmly established, and that no previous acts of the crown should be regarded as a precedent. The king, after procrastination and much evasion, answering by an address to both Houses, consented to the bill in the usual form of royal approval.

Further controversy occurred in reference to what was known as the "tonnage and poundage impost." The king claimed the right to impose these taxes without consent of Parliament, and, pending the dispute in respect thereto, prorogued, and finally dissolved, Parliament. During this session a religious controversy arose between the king and the Commons, which intensified the bitterness of the dissension. The king substantially declared, after the dissolution, to govern without calling the Parliament together; committed prominent men, members of the House, to the tower; discarded the principles of the Petition of Right, to which he had assented, and resorted to unlawful methods for raising revenue.

One of these methods was the levying of a tax called "ship-money" upon the subjects of the kingdom, for building ships of war for the navy. Among those upon whom this tax was levied was John Hampden of Buckinghamshire. The levy

upon him was the trifling sum of twenty shillings. Hampden resisted it, and appealed to the courts to relieve him, on the ground of its illegality. The case was heard in the Court of Exchequer before all the judges. A judiciary dependent for its tenure of office upon the Crown decided in favor of the tax, and it was enforced. The proceedings in the case are summarized by Hallam,¹ and are fully reported in *State Trials*.² This was in 1636. In the language of Mr. Burke in his speech on American taxation in 1774: "The feelings of the colonies were formerly the feelings of Great Britain. Theirs were formerly the feelings of Mr. Hampden, when called upon for the payment of twenty shillings. Would twenty shillings have ruined Mr. Hampden's fortune? No! but the payment of half twenty shillings, on the principle it was demanded, would have made him a slave!"

The issue thus joined between the crown and the people upon the question of the tax power, which, as we have seen, had been settled for three centuries, was decided by the judiciary in favor of the crown. The Commons dissolved had no opportunity to protest, and the king refused to call them. The subdued sentiment of resistance had no vent, but it became the more powerful for that reason.

§ 89. In 1637, Charles found men, women and children in revolt for Christ as the head of the Church, under the "Solemn League and Covenant" of the Scotch reformers. Multitudes, under the name of Covenanters, were assembled everywhere in Scotland in armed resistance to the headship of the king in the Church of Christ. Charles raised an English army to put down the Scotch uprising. The Puritan soldier, in sight of the banner of the Covenanters, refused to aid or do his master's bidding, and the royal power was paralyzed. Meanwhile the animosity of the people to the throne, engendered by the unlawful exercise of the power of taxation and by the illegal arrest of those who refused submission

¹ Constitutional History of Eng- ² Pages 826-1252.
land, ch. 8.

to royal demands, and by the policy of persecution employed against the Puritans of England, made the tide of discontent so high that rebellion was imminent. The king, during more than ten years in which no parliament sat in England, had exhausted every means of raising money for his purposes, and was compelled at last, very reluctantly, to call the Parliament in April, 1640. This Parliament was not inclined to consider measures; refused to grant a supply of money to the crown until the manifold abuse in Church and State had been considered and acted upon. The king demanded subsidies, the Commons refused until the grievances were redressed. The king dissolved the parliament in May, 1640. But the popular voice could no longer be suppressed. Peers and citizens demanded the recall of the parliament. The English army, disaffected and undisciplined, retreated before the Scotch. Negotiations with the latter became inevitable.¹ This celebrated parliament, known as the "Long Parliament," met in November, 1640, with a stern purpose to settle, upon foundations solid and permanent, the great questions of constitutional law which Charles for fifteen years had trampled under foot. The great Triennial Bill for parliaments, a bill declaring "ship money" illegal, and annulling the judgment against Mr. Hampden; an act asserting the ancient and indubitable right of taxation by the Parliament; the abolition of the Star Chamber; the denial of the right of the king to intervene during the consideration of a bill, with any suggestion, as a breach of their privilege,—these were the principal acts in the beginning of this Parliament.

Along with these was decided action taken in reference to ecclesiastical matters. The Commons were disposed to press their reform to extreme lengths, and even to trench upon the unquestioned prerogative of the crown. The king, driven to desperation, entered the House of Commons and attempted to seize five of its members, of whom Mr. Hampden was one, on the charge of treason. This precipitated the rebellion.

¹ Hallam, *Constitutional History of England*, ch. 8.

Charles, by prerogative, had the command of the army and would not surrender it. The issue between the Crown and the Commons was too serious to end otherwise than in civil strife. The war ended on the 30th of January, 1649, in the execution of the king. Immediately after the death of the king the dominant party in the House of Commons abolished the monarchy and the House of Lords, and established the Commonwealth. The House had been largely under the dictation of the army, and its members had so far decreased that it gained in history the title of the "Rump Parliament." It was officially dissolved by Cromwell, with soldiers at his back, but the Protectorate of Cromwell fell and ceased at his death in September, 1658.

In a few years the confusion in the kingdom between the parties contending for power resulted in the restoration of the monarchy, in the person of Charles II., in 1660. This result followed naturally from the forcible overthrow of the checks and balances of the original system of government. The unification of all power in the single House of Commons gave ample opportunity for the oppression of the classes not represented in it. It was despotism by a unified democracy, which found its natural representative in a military chieftain, and thus the swing of the pendulum from uncontrolled democratic power to the despotism of the protectorate was inevitable. It was not surprising but natural, therefore, that the diverse social elements of the kingdom sought to restrict the ancient system of government, based upon the three estates of the realm — king, lords and commons.

The reign of Charles II. was one in which the monarchy of Charles I. was not restored. That absolute monarchy fell forever with its beheaded chief. The "Royal Image," at one time, but falsely, attributed to Charles I., in the powerful vindication of the people of England by John Milton, in "The Iconoclast," met its final overthrow. The monarchy was restored by Charles II., but shorn of its continental preroga-

tives, and subject to the foundation principles of *Magna Carta* and the Petition of Right.

It is true that much in the administration of Charles II. was arbitrary and adverse to the principles of British liberty; but the famous *habeas corpus* act — the shield of personal liberty — was passed nine years after the restoration, and the power of the Commons in matters of taxation and of the conduct of the government was no longer disputed by the prerogative. The excesses of the parliamentary government, and of the commonwealth and the protectorate, produced a strong reaction against the liberal principles of Mr. Hampden and the doctrines and habits of the puritans. But these still survived, awaiting the opportunity for renewed assertion and for ultimate triumph. Popular outbreak against the restored royal power was perhaps prevented by the insincere profession of the reformed faith by the king; insincere, because in his last moments he professed the faith of the Church of Rome and received its last rites.

§ 90. James II. succeeded him in 1685,—a sincere Papist by profession as well as creed, and a genuine Stuart in his belief in despotism. But it must be observed that the element of opposition to the prerogative, which had, for more than a century, been potent in English history, reared again its head against the prerogative of James II. The religious consciences of the reformers of England were roused to intensify the opposition of the mere civilian to the authority of the crown in the person of one who was Papist, as well as despot in his principles. James showed tact and skill in the management of his affairs at this crisis.

The “test act,” passed in the time of Charles II., had equally excluded Catholics and dissenters from office. James, in order to open the official door to Papists, issued a proclamation, by which he proposed to dispense with the “test act” as to all who were excluded from office thereby. The terms of his proclamation would have made all offices in the kingdom accessible to Papists as well as dissenters. He conceived that his proposition for dispensation would thus

conciliate the dissenters, whom he would never appoint to office, and do away with the exclusion of Papists, whom he would be disposed always to appoint. The proposal was an adroit one, and was received by many of the people of England as an indication of a liberal disposition on the part of the king towards the dissenters. He directed his proclamation to be published by the bishops of the realm to their people. Seven of their number detected the artifice of the king, and by advice of prominent civilians as to the danger and unconstitutionality of this prerogative of dispensing with and suspending laws, and the execution thereof, without the consent of Parliament, refused to publish the proclamation, for which they were persecuted and tried. They were defended by Summers — afterwards Lord Chancellor Summers — and acquitted, and the seal of condemnation was thus put by the verdict of the jury upon the dispensing power claimed by the king.

The popular ferment raised by this and other events induced the king prudently to fly to the continent and abandon the kingdom. Overtures had already been quietly made to the Prince of Orange, who had married Mary, the daughter of the refugee king, looking to his possible succession, in right of his wife, to the throne. The birth of a Prince of Wales a short time before the flight of the king had extinguished the probability of her succession, and as she was a Protestant, the uneasiness of the Protestant people of England of the perpetuation of a popish dynasty upon the throne ripened events for a rupture. The flight of the king greatly relieved the situation, for William was at once invited to England, and there was presented to him and his wife a declaration in writing, on the 13th of February, 1688, in which it was declared, among other things, that King James II. had abdicated the government; and the throne being thereby vacant, the Prince of Orange had caused letters to be written to the Lords, Spiritual and Temporal, and to the counties, boroughs, etc., for the choosing of representatives in parliament to meet at Westminster, in order

to such an establishment as that their religion, laws and liberties might not be subverted.

The Parliament assembled and made a Declaration of Rights, which was afterwards enacted as a Bill of Rights in 1st William and Mary, Session 2.¹ This Bill of Rights declared William and Mary to be King and Queen of England; and the succession to the crown after them. And Section 6 of the said Act declared, "That all and singular the rights and liberties asserted and claimed in the said declaration, are the true, ancient, and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, deemed, and taken to be, and that all and every the particulars aforesaid shall be firmly and strictly holden and observed, as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come."

This extraordinary declaration of the ancient and indubitable rights and liberties of the people to be perpetuated as binding in all times to come is more than mere legislation, and is like the provision of a permanent and unchangeable constitution.¹ This Parliament not only elected the persons who should fill the throne, but declared the succession thereafter, and furthermore excluded any one in the line of that succession who might be a papist from ascending the throne or holding it, and absolving their people from any allegiance to any such.

In the 12th and 13th of William III. the act of settlement prescribed the succession to the crown after the death of William and Mary, and Anne, the sister of Mary, without issue of their bodies, and by the rule of succession thus prescribed the throne has been filled ever since to this day. So that for two hundred years, under the acts of Parliament in 1688 to 1689, the throne has been filled by appointment of the Parliament of England, and it will be seen by reference

¹See Appendix.

to the Bill of Rights¹ that the liberties of the people and their power in the House of Commons was prescribed as a fixed part of the British Constitution at that time. So that the constitutional monarchy of England may be said to have received its full and final confirmation at the accession of William and Mary, by the action of all the estates of the realm, by the *de facto* Body-politic of England.

Since that period, prerogative has never dared to invade the domain of popular power in the matter of taxation or personal liberty as exercised by the House of Commons, and as defended by the independent judiciary, for since the third year of William and Mary the judicial tenure has been held, not during the pleasure of the crown, but during good behavior, or substantially for life.

§ 91. This historical sketch of the salient facts in the ten centuries prior to the Revolution of 1688 to 1689, and especially of the four centuries from the reign of Edward I., will serve to show how through the fierce antagonisms of two powerful races; the jealous rivalry of two systems of jurisprudence; the conscientious conflicts of two forms of religious creeds — that of Rome and of the Reformation; the social strife of Norman caste with Saxon people; the political struggles between the prerogative of an alien dynasty and the ancient liberties of the people through a representative organization; the three estates of the realm, united in the political organism of Edward I., rude and not precisely defined, emerged in the Convention Parliament of 1688 and 1689, “assembled in a full and free representation of this Nation,” and declared in the Bill of Rights their ancient rights and liberties, and established the constitutional monarchy of England, in which the three estates were in distinct organisms clothed with independent political authority to protect and conserve the rights of each, the prerogative of caste and the liberties of the people, as they were prescribed and defined by the Declaration of Rights, enacted into law by the Parliament composed of the three estates of the realm — the

¹ See Appendix.

King, Lords and Commons. This result gathered together the historic institutions of the past, and made them stand together (*con-stituo*) as the written and permanent Constitution for the British realm forever. This is the Institutional Constitution of England — institutional in its principles and in its “subtle organism, which has proceeded from progressive history;”¹ and a Constitution in that the institutions proceeding from progressive history were made to stand together, as the written compact between the three estates of the realm, by the Bill of Rights enacted into fundamental law by the King, Lords and Commons in 1688 and 1689.

This Constitution was born of conflict. Its pathway in progressive history is marked by bloody strife. Power held the vantage ground of liberty; but liberty, by brave and persistent energy, achieved its organic place in the political mechanism; and now not only maintains its ancient right, but dictates the policy and secures the destiny of the British Empire.²

§ 92. It will therefore be understood that the monarchy which fell with the head of Charles I. from the block in 1649 was not restored with Charles II. in 1660. The old monarchy had its traditions of prerogative; its Star Chamber; its denial of *Magna Carta*, and its contest with the House of Commons as to taxation. That ancient system was buried beyond resurrection in 1649. Charles II. tried reaction, menaced despotism, but failed. James II., by the restoration of papal influence and despotic rule, made reaction impossible.

A brief epitome of the causes for the Revolution in the Declaration of Rights may now be given:

(a) Denying the suspending and dispensing power by the crown as to laws passed by parliament. This, if permitted,

¹ Gladstone.

² “For Freedom’s battle once begun,
Bequeathed from bleeding sire to son,
Though baffled oft, is ever won!”

— *Byron’s Giaour*.

would virtually have enabled the king, by his sole act, to repeal the legislative act of the three estates of the realm.

(b) No taxation but by Parliament.

(c) The right of unrestrained petition by the people against public grievances.

(d) The denial of the right of the king to a standing army without the consent of Parliament.

(e) Freedom of elections by the people from the control of the crown and nobility.

(f) Freedom of speech and of debate in Parliament without question or prosecution in any court.

(g) Declaration against excessive bail, excessive fines and cruel and unusual punishment.

(h) Security of trial by jury.

(i) Frequent parliaments.

(j) The election of William and Mary and declaration of succession to the crown.

(k) The permanent exclusion from the crown of any successor who did not abjure the Papacy.

The crown had immemorially exercised its powers through the privy council. After the accession of William and Mary a select body of Councillors from the Privy Council constituted the cabinet of the king.

About this period two parties were formed in England, representing distinct lines of policy based on diverse views of the Constitution of the Kingdom. These parties went under the names of Whig and Tory. The Bill of Rights, while clear in its statement of general principles, necessarily left much, as all such papers do, to interpretation. The Tory party tended to interpret the Constitution in the interest of royal prerogative—the Whig party, in the interest of popular liberty and of the power of the House of Commons.

The power of the House of Commons, while in theory that House was the representative of the people, was very much impaired by the influence of the crown and nobility, in the election of a large proportion of the members of that House.

This, as already stated, was aggravated by the distribution of power among the counties and boroughs of England. The House of Tudor, it is alleged, created a large number of boroughs, of very small population, over which the resident nobility and the crown had large and sometimes paramount influence. These boroughs obtained the name of "Rotten Boroughs," because, while professing to be the representatives of the people, they were in reality, by reason of the influence of the crown and nobility, not representatives of popular opinion, but representatives of the crown and the nobility in the popular House.¹ It was reckoned that in the first parliament of George I., 232 members of the House had places, pensions or titles; besides these, a great many brothers and heirs-apparent to the nobility, to a number of not less than 50, making in all 282, constituting in reality a majority of the House. It was well asked by Sir James Mackintosh: "Who can, without indignation, hear the House of Commons of England called a popular representative body?"²

Such a state of things necessarily disturbed the balances of the Constitution and made the king and House of Lords dominate the will of the House of Commons. This state of things produced a deep feeling among the people and the friends of liberty in England in favor of reform, which would make the House of Commons the real representative of the people, and free it from the control of caste. This finally brought about the passage of the celebrated Reform Bill in 1832, which was so radical in its character as to change essentially the distribution of the organic power between the three estates and give to the House of Commons the character of a true and independent representative of the popular will.

It is said that before the passage of that act 56 "rotten boroughs" elected 111 members, each representing its 2,000

¹ Tucker's Blackstone, Appen., pp. 56, 57.

² Mackintosh's Defense of the French Revolution, p. 154.

people, and 32 "rotten boroughs" sent 32 members, each representing less than 4,000 people; so that at that time 88 "rotten boroughs" elected 143 members, representing 360,000 people, or nearly one-third of the House elected by one-fiftieth of the entire population.

The Reform Bill, passed in 1832, was backed by the powerful influence of the king, William IV. The Bill largely extended the right of suffrage, and demolished the "rotten boroughs" and equalized representation in a large degree in proportion to the population of the shires and boroughs. It may as well be mentioned that but for the royal advocacy of this Bill it would probably have been defeated in the House of Lords, for the members of that House saw in its passage the demolition of their influence in controlling the action of the House of Commons. But the king threatened that if the House of Lords, as it was then constituted, should reject the Bill, he would insure its passage by the appointment of a sufficient number of new peers favorable to the Bill to overcome the opposition in the House of Lords. This menace of the advent of mushroom aristocracy among the ancient nobility of the kingdom made the Lords select the alternative in the dilemma presented in passing the Bill.

This Reform Bill was followed after many years by the reform bill of 1867, which largely extended suffrage and increased the popular character of the House of Commons. It is said that prior to this act of 1867 there were 1,500,000 voters composing the voting constituency of the House of Commons. Since that Act the number of suffragans has increased to 3,000,000 — just double.

It will therefore be perceived that while the Constitution of 1788-89 in form established the House of Commons as the free representative of the people of the realm, it did not do so fully and in reality; but liberty, which demanded popular power, moved with unfaltering courage to obtain the passage of these bills which should make the House of Commons a real representative of the people of Great Britain.

§ 93. An analysis of the constitutional Monarchy of England in its present state will now be attempted.

First. The Legislature of the Kingdom consists of King, Lords and Commons. Of these we will consider first the House of Commons and its powers.

(a) The power of taxation in this House is clear, initiatory and supreme. All money bills must originate in the House of Commons. By money bills are meant bills laying taxes and also bills appropriating money. So that no bill imposing taxes of any kind, and no bill appropriating money of any kind, can become a law unless it has been first passed in the House of Commons.

It may be well to note that in this respect the provision of the Constitution of the United States differs from the English Constitution. It provides¹ that all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur in amendments as on other bills. As will be hereafter shown, this clause of our Constitution does not include bills for appropriating revenue, although that view has been maintained with great earnestness by many of our public men.

(b) In all other legislation the House of Commons has co-ordinate but not originating power. Nothing can be law in England unless it has the concurrence of both Houses and the sanction of the crown. All legislation other than money bills may originate in the House of Lords.

(c) The power of the House of Commons to impeach the officers of the crown is unquestionable, and upon such impeachment no royal pardon can be pleaded. This last, which had been controverted, was established by the act of 12th and 13th William III., chapter 2.

(d) By the principles of the government, a vote by the House of Commons of want of confidence in the ministry will cause its resignation, or a dissolution of parliament and an appeal to the people, so that the cabinet ministers of the crown become indirectly responsible to the House of Commons.

¹ Const. U. S., Art. I, sec. 7.

The origin of this power, which has no direct provision in the Bill of Rights, or any other document in English history, is in the exclusive and supreme power of the House of Commons to grant supplies to the crown. The House of Commons has from time immemorial, as we have seen, attached to their grants of supplies the precondition of a redress of grievances, and then held that there is no grievance which needs more immediate redress than that the crown should be under the advice of evil and wicked counselors.

When, therefore, they vote a want of confidence in the ministry of the crown, it is an intimation which is to be understood from "progressive history" that supplies will be denied until the grievances are redressed; in other words, that money will not be supplied to the crown to be disposed of by a ministry in whom the House of Commons has no faith. It has therefore come to pass that a vote of want of confidence is the death of the ministry, unless by appeal to a new House of Commons, to be elected by a fresh vote of the people, the ministry should be sustained against the lack of confidence manifested by the old House of Commons.

(e) Ministers are Members of Parliament, and when appointed to the Cabinet, if at the time members, they must resign and be re-elected. They cannot represent the people after taking office from the crown without the sanction of their constituents. Ministers, as members, are open to question in the House as to matters connected with their ministerial duties. The responsibility of ministers to the House is enforced, as has been said, by the power of the House to refuse supplies if not yielded to.

Mr. Bagehot, in his "English Constitution," has said that the House has five functions: "the elective," that is, that it substantially elects and deposes the real executive of the Nation, with his ministry. Its "expressive" or declaring function is to express the mind of the English people. Its third and fourth functions are what he calls the "teach-

ing and informing functions;" that is, through debates and reports on political matters, and on subjects of popular concern. And then there is the "function of legislation."

The use of the army by the crown was a disturbing influence at one time in the election of members of the House of Commons. This gave rise to the Act of 8th George II., in 1735, by which it was enacted "that the troops shall be removed during the time of an election out of the place where the election is directed to be held, and so to continue during the time of such election." And in 1741, where an officer had violated this statute, it was resolved that it was a "manifest violation of the freedom of elections and an open defiance of the laws and Constitution of the Kingdom." The persons concerned in this violation were ordered before the House and received, on their knees, a very severe reprimand from the Speaker.¹

§ 94. Let us now consider the House of Lords. The House of Lords is composed of the peers and the ecclesiastics. Peers by inheritance and peers by new creation. Peers are of different grades: duke, marquis, earl, viscount, and baron. The Spiritual Lords who sit in the House are two Archbishops and twenty-four Bishops.² Besides these English peers, sixteen representative Scottish peers are elected for each Parliament by members of their own order; and twenty-eight peers from Ireland are elected for life by their fellow Irish nobles.³ Besides these secular peers there are twenty-four bishops entitled to seats in that House.

The House of Lords is a co-equal branch of the legislative department, except that it cannot originate money bills. For a long period of time, until within the last year, the House of Lords never rejected a bill upon which the House of Commons insisted. It proposed amendments to all bills where deemed proper, and, in the Irish Disestablishment Bill in 1869-70, it insisted upon its amendment, which was

¹ Hallam's Constitutional History, p. 635, and note.

³ De Lolme on the Constitution, p. 56, and note.

² Blackstone, Bk. I, pp. 155-56.

carried. At the end of Mr. Gladstone's late administration, it rejected his Home Rule Bill by an overwhelming vote, and with boldness, not to say audacity of temper; and it also rejected the Employer's Liability Bill connected with the Irish policy. The feeling that was excited by this action of the House of Lords rose to the point of agitating the question of its longer continuance as a co-equal branch of the legislature, but a powerful reaction has taken place against this radical idea, which resulted in a change of ministration upon a dissolution of Parliament and an appeal to the people, and on that appeal the people may be said to have suppressed the agitation looking to so radical a change.

Since the Reform Bill of 1833, and the increased power of the House of Commons resulting therefrom, the House of Lords have had less influence in the active law-making of the Kingdom, and is, in the main, reduced to a criticising and revising body. The positive force in the direction of legislation is the House of Commons; the House of Lords revises and amends, but does not initiate. It stays and suspends action — calls a halt upon the proposals of the House of Commons; but except in the cases above mentioned has not, for half a century, obstructed the passage of any measure upon which the House of Commons insisted.¹

It must be understood that the House of Lords has not the power which the House of Commons has, by its disapproval of the action of the ministry, to cause their resignations. This extraordinary function belongs only to the House of Commons. It is needless to cite any examples of this, except the rejection by the House of Lords of Mr. Gladstone's bill for Home Rule in Ireland. This did not cause the resignation of the ministry, because the action of the ministry was sanctioned by the House of Commons. The power of the House of Lords to amend tax bills has been denied by the House of Commons, and cases have occurred where, upon such amendments being made, which the House of Commons did not dissent from, the Commons have chosen

¹ Bagehot's English Constitution, ch. 4.

rather to introduce a new bill, including the proposed amendment of the House of Lords, than to permit their own original bill to be amended by that House.

The House of Lords in 1702 passed a resolution which it made one of its standing rules, that the annexing any clause to a bill of aid or supplies is unparliamentary, and tends to destroy the Constitution of this Government.¹ This applies, however, only to a clause which is not *germane* to the bill of supply.

§ 95. Taking the two Houses of Parliament as a whole, we may remark:

(a) The independence of the Members of Parliament during the sessions of the body is secured.

(b) Tax bills and appropriation bills are usually only for a year, so that, if the tax or appropriation be not agreeable to the popular will, the House of Commons responds and repeals, and the House of Lords will not defeat the repealing act. Indeed, if any tax already imposed becomes distasteful to public sentiment, the House of Commons would respond by repeal, and neither the House of Lords nor King would obstruct the repeal. The King would not, because his ministry would approve the repeal, or, if it did not, would be compelled to resign upon a vote of the House of Commons against their maintenance of the tax; so that it may be taken as absolutely true that all taxes and appropriations of money, whether only for a year or for a longer period, will be repealed at the expressed will of the House of Commons. At this point it is proper to note that the government of England is more sensitively responsive to the popular will on a question of taxation or appropriation than the Federal Government is in this country. A tax bill of any kind passed by Congress, and approved by the President, cannot be repealed upon the declared wish of the House of Representatives, but may be perpetuated, however much the popular discontent, until the independent wills of the House, Senate and President concur in the repeal.

¹ Amos' Fifty Years of the English Constitution, p. 73.

(c) Appropriations for the support of the army and navy are for a year only. At the close of the year for which they are made, the army and navy are without money to support them unless a new appropriation be made. The King, without money to support either, is powerless to use them if the House of Commons, considering them dangerous to liberty, shall refuse a re-appropriation, so that by the money power the royal power of the sword is paralyzed at the will of the House of Commons in refusing the sinews for their support by a re-appropriation.

(d) But the control of the House of Commons is even greater than this. Non-appropriation of money would leave the army and navy in complete organization, but another custom of the kingdom more effectually secures the people against a standing army or navy. On this subject a quotation from Mr. Hallam's work is all that is necessary, with the remark that the "mutiny bill" to which he refers was first passed in the reign of William and Mary, just after the Revolution of 1688-89, by the Convention Parliament.¹

"This annual session of Parliament was rendered necessary, in the first place, by the strict appropriation of the revenue according to votes of supply. It was secured, next, by passing the Mutiny Bill, under which the army is held together, and subjected to military discipline, for a short term, seldom or never exceeding twelve months. These are the two effectual securities against military power: that no pay can be issued to the troops without the previous authorization by the Commons in a Committee of supply, and by both Houses in an act of appropriation; and that no officer or soldier can be punished for disobedience, nor any court-martial held, without the annual re-enactment of the Mutiny Bill. Thus it is strictly true that, if the king were not to summon Parliament every year, his army would cease to have a legal existence, and the refusal of either House to concur in the Mutiny Bill would at once wrest the sword out of his grasp. By the Bill of Rights, it is declared unlawful

¹ 1 Blackstone, Bk. I, pp. 211-12.

to keep any forces in time of peace without consent of Parliament. This consent, by an invariable and wholesome usage, is given only from year to year; and its necessity may be considered, perhaps, the most powerful of those causes which have transferred so much even of the executive power into the management of the two Houses of Parliament.”¹ It will thus be seen that the Mutiny Bill expires at the end of each year, and the army and navy disband, if Parliament does not repass the Mutiny Bill, for the king can hold no soldier or sailor subject to military law, and this right of person is vindicated against the crown by the great writ of *Habeas Corpus*, of which we will now speak.

(e) The *Habeas Corpus* Act, in its final form, was passed in the 31st year of Charles II.² Mr. Hallam shows that this beneficent enactment introduced no new principle, but was only a more definite and well digested remedy against illegal imprisonment in behalf of the citizens, by requiring a judicial inquiry into the cause and sufficiency of the commitment and holding the citizen in custody.

And it is important here to note the fact that this writ under this act is perpetual and cannot be suspended or taken away by any other power than an act of Parliament. The king cannot suspend the privilege of this writ, because, being a statute of Parliament, the provision of the Bill of Rights of 1689 declared that “the power of suspension of laws, or dispensing with them, or the execution of them by regal authority and without the consent of Parliament, is illegal.” So that it comes to pass that, by the expiration of the term of the annual Mutiny Bill, every soldier and sailor, by the judicial power, will be released from royal authority, unless the Parliament itself shall suspend or repeal the operation of the *Habeas Corpus* Act.

(f) Parliament at one time was made triennial in its term by the Statute of 6th William and Mary, chapter 2, but the

¹ Hallam's Constitutional History, pp. 573-74. Hallam's Constitutional History, ch. 13.

² Stubbs' Select Charters, p. 517;

Parliament now expires by limitation in seven years, by Statute of 1 George I., St. 2, c. 38.¹ It is obvious from what has been said that the fiscal power, which was settled in the reign of Edward I., is the great lever in the hands of the House of Commons by which royal misrule is prevented or is overthrown.

In ancient republics a caste proposed legislation which the people might reject or adopt, but in England the people initiate all action through the House of Commons in respect to taxation or appropriation, and must concur in the passage of all bills before they can become law.

§ 96. The executive power in the English government is vested in the crown, and includes very large and dangerous powers. The prerogatives of the crown will now be mentioned.

(a) The king declares war.

(b) The king is commander-in-chief of the army and navy.

(c) The king makes peace and negotiates and ratifies treaties with foreign powers.

(d) The king has the absolute veto power upon all bills passed by the two Houses.

(e) The king holds by hereditary title, but subject to limitation by Parliament.²

This limitation upon the hereditary title of the crown by act of Parliament had been often exercised, as Blackstone shows, but was vindicated as a settled principle of the Constitution by the Bill of Rights of 1689, and the Act of Settlement of 12th and 13th William III., in 1700.³

The House of Lords, by statute in the 1st of Edward IV., Chapter 2,⁴ claimed to hold the crown *de jure*, and that the holding by the kings of the House of Lancaster was only *de facto*, or in the language of the statute, "In dede and not of ryght!" Despite this hereditary title it was from time immemorial asserted that the king was *sub deo et sub lege*.⁵

¹ 1 Blackstone, p. 189.

⁴ Blackstone, Bk. I, pp. 204, 205.

² Blackstone, Bk. I, p. 210.

⁵ *Id.*, pp. 233, 234.

³ Stubbs' Select Charters, pp. 523,

De Lolme in his celebrated work has attempted to vindicate the British Constitution as an hereditary monarchy by conceding that every subject of the kingdom, and Parliament itself, is intensely interested in checking and jealously watching the king lest he should stretch his prerogative beyond proper limits, and the more so because no subject can ever fill the throne. This is ingenious, but can hardly justify a constitution which puts upon the throne a dangerous person with hereditary title, a perpetual holding, irresponsible in the exercise of power, merely because all of these demand strict vigilance on the part of his subjects. It would seem logical that the best cure for such a danger would be in removing it or preventing its existence and not to create it as a means of stimulating its power.

He maintains, however, that as the king has all that he can want, he will not be disposed to raise popular tumult by trying to increase his prerogative. His life is easy and luxurious with a limited prerogative, and may be disturbed by popular tumults if he should attempt to increase it. This may be the case where the king is a good-natured, unambitious man, inclined to do no wrong against the liberties of his subjects, but the experience of mankind has not justified the hope that the security of liberty will be found in the excellent disposition of hereditary kings. And in the glowing eulogy upon the English monarch which this great author has pronounced, it will be found that the safety of the liberties of the people under the hereditary monarchy in England is due, not to reliance upon his personal disposition, but upon the paralysis of his evil purposes through the checks upon his prerogative exercised by the House of Commons — the representative of the people.¹

De Lolme has stated the case very strongly in the following language: "The king of England, therefore, has the prerogative of commanding armies and equipping fleets; but without the concurrence of his parliament he cannot maintain them. He can bestow places and employments, but without his par-

¹ De Lolme on the Constitution, pp. 61-67, 252-259.

liaments he cannot pay for the salaries attending on them. He can declare war, but without his parliament it is impossible for him to carry it on. In a word, the royal prerogative, destitute as it is of the power of imposing taxes, is like a vast body, which cannot of itself accomplish its motions; or, if you please, it is like a ship completely equipped, but from which the Parliament can at pleasure draw off the water, and leave it aground — and also set it afloat again by granting subsidies.”¹

Mr. Bagehot, in his second chapter on the monarchy,² gives some very ingenious reasons in favor of the hereditary monarchy, in which he concludes that the monarch is the representative of the pomp and dignity of the government, stands at the head of its society, is the head of its morality, is a quiet councilor with a long experience from which he may make suggestions to his ministers, with power to dissolve the Parliament, and thus appeal from the old to the new representative of the people, and that if disposed not to make his prerogative trench upon the liberties of the people, he may pass a comfortable life himself, without much detriment to the public interest; but he asks very pointedly:

“But can we expect such a king, or, for that is the material point, can we expect a lineal series of such kings? Every one has heard the reply of the Emperor Alexander to Madame de Staël, who favored him with a declamation in praise of beneficent despotism: ‘Yes, Madame, but it is only a happy accident.’ He well knew that the great abilities and the good intentions necessary to make an efficient and good despot never were continuously combined in any line of rulers. He knew that they were far out of reach of hereditary human nature. Can it be said that the characteristic qualities of a constitutional monarch are more within its reach? I am afraid it cannot. . . .

“If we look at history, we shall find that it is only during the period of the present reign that in England the

¹ De Lolme on the Constitution, pp. 66, 67.

² Bagehot’s English Constitution, p. 99.

duties of a constitutional sovereign have ever been well performed. . . .

“An ordinary idle king on a constitutional throne will leave no mark on his time; he will do little good and as little harm; the royal form of cabinet government will work in his time pretty much as the unroyal. The addition of a cypher will not matter though it take precedence of significant figures. But *corruptio optima pessima*. . . .

“We have an awful instance of the dangers of constitutional royalty. We have had the case of a meddling maniac. During great part of his life George III.’s reason was half upset by every crisis. Throughout his life he had an obstinacy akin to that of insanity.”¹

§ 97. The king’s cabinet is a body of men in charge of the different departments of the government, selected by the crown and removable at the king’s pleasure. This cabinet, though it has the pride of executive rank, holds office under a sense of popular responsibility which makes the cabinet represent largely the popular will. The relations of the sovereign to his cabinet embrace three rights: the right to be consulted, the right to encourage, and the right to warn.² A wise and sagacious monarch would be likely to leave all else to his respective ministers, and with a long and intelligent experience he could use these powers with great effect upon his ministry. The late Prince Albert, it is said, gained great power in precisely this way.

Cabinet ministers, being also members of one or the other Houses of Parliament, are leaders of their respective parties in these bodies; are imbued with the same general sentiments, and thus feel, as a member of the executive, the impulses which operate upon the legislative branch of the government. The fact that these ministers must not only be competent to direct the affairs of their respective departments, but be ready and act in debate upon a question which arises before either House, makes a rare combination of

¹ Bagehot’s English Constitution, pp. 146-151. ² Id., p. 139.

practical statesmanship, with skill as a debater, necessary for the cabinet of the king. The premier of the administration ought to be, and generally is, not only a comprehensive statesman, but a skilful debater and with tact for parliamentary leadership.

The history of the past century will show that these requisites have combined in a large proportion in the public men who, as premiers in the cabinet of the king, have directed the destinies of the empire.

It is proper to add that, as the House of Commons, through its initiatory and dominating influence in the matter of grants of money, has such control over the tenure of office of the ministers of the crown that a vote of want of confidence, or a defeat of a principal measure of the administration in that House, makes it impossible for the ministry to hold office longer in co-existence with that House of Commons; accordingly, on the happening of either of these events, the ministry resign or advise the king to dissolve the Parliament, on an appeal to the people from the action of the then House of Commons adverse to their continuance in office. If the election for the new House results in the return of a majority in favor of the ministry they retain office; if the majority be adverse, the ministry resign, even before the meeting of Parliament. Examples of both of these have occurred within the last five years in England. Lord Salisbury dissolved Parliament and appealed to the people, which was adverse to him, whereupon he at once resigned and Mr. Gladstone formed a cabinet which made the new House. Within the last two years, Lord Rosebery did the same, and upon the returns of the election resigned office, and was succeeded by Lord Salisbury.

It is thus seen that at this time the absolute responsibility of the ministers of the crown to the expressed will of the House of Commons is as well established as if it were a provision of a written constitution. This results, as has been fully indicated heretofore, from the possession of the money power by the House of Commons as far back as the reign

of Edward I. To these money bills, as we have seen, they joined petitions for the redress of grievances, and afterwards, in the reign of Henry IV., declared they would come to no resolution in regard to subsidies until the king had given a precise answer to their petitions. Afterwards, when abuses of power had taken place, they made grievances and supplies, to use the language of Sir Thomas Wentworth, go hand in hand, a policy which always produced redress of grievances, "and in general, when a bill, in consequence of its being judged by the Commons essential to the public welfare, has been joined by them to a money bill, it has seldom failed to *pass in that agreeable company.*"¹

At this day the ministry, therefore, must be in accord with the House of Commons, or it will be in the dilemma of immediate resignation or dissolution of Parliament. The dissolution of Parliament is called by Mr. Bagehot the "regulator in the machinery." It appeals from popular sentiment represented by an old House, to the popular sentiment which will elect a new one. Whatever the new one so elected decides, is final on that appeal. It is the fresh expression of popular will. The ultimate authority in the English Constitution is a newly elected House of Commons,—it can despotically and finally resolve.²

If the House of Commons is bent upon the passage of a measure to which the House of Lords strongly objects, as in the case of the Reform Bill of 1832, the ministry, who are necessarily in accord with the House, will advise the king to appoint new peers in sufficient number to overcome the opposition of the Lords. This, Mr. Bagehot calls the "safety-valve of the Constitution."³

§ 98. We can now see in detail how the House of Commons can completely checkmate the great prerogatives of the Crown to which we have referred.

Take the war power. Suppose the monarch desires to make

¹ De Lolme on the Constitution, p. 67.

² Bagehot's English Constitution, p. 288.

³ Id., p. 290.

war, which the Commons oppose, and he declares it without the consent of his ministers. As he cannot make war without money, the Commons, by refusing to repass the Mutiny Bill, would disband his army and navy within a year, and, by refusal to appropriate money for the war, would make the army and navy, before disbanding, absolutely useless. But suppose the ministers of the Crown should press a war to which the Commons were opposed, a vote of want of confidence, which would be the signal of denial of all the sinews of war to the ministry, would compel their resignation and the appointment of a new ministry adverse to war. So that war in form is a prerogative of the king,—in substance it is at the will of the Commons.

Take another:—the king is generalissimo of the army and navy. He wishes to use both in foreign war, or for aggression against the liberties of the people. This will be short-lived; they will end with the expiration of the Mutiny Bill, and will be inoperative for lack of the sinews of war, which Parliament alone can supply. Suppose the king does not desire to make war and the Commons do, for the honor or defense of the nation. The king's reluctance will be overcome by a vote of want of confidence and a change of ministry; or, if he be stubborn, by a refusal of supplies for ordinary purposes, until the king shall declare the war that the people dictate.

Take another prerogative. The king can make peace. Suppose he makes peace when the Commons think the continuance of the war necessary. By the lever of the money power they can dictate the continuance of war, instead of the proposed royal peace; or if the Commons want peace when the king says war, by refusal of the sinews of war they will compel peace. The king has exclusive power of negotiating treaties. This function he performs through his ministry. If the treaty is distasteful to the Commons, the ministry cannot make it, but must resign upon a vote of want of confidence. But they may dictate a treaty to which the Crown and his ministry are parties, by like measure.

Again, if a treaty be made which involves the payment of money to a foreign power, the treaty is of no avail as an obligatory contract on the nation if Parliament refuses to make the appropriation of money. So that the treaty-making power in the appropriation of money is dependent upon the will of the Commons.

Take the veto power: This has not been exercised since 1692, when it was employed by William III.¹ The reason for the failure to make use of it is very obvious. As long as the king was a hereditary executive, independent of the power of Parliament for his title to reign, his veto would have been proper and natural; but since the real executive became his ministers, who held office at the will of the Commons, and whose opposition to the will of the Commons would cause a change of ministry as soon as it was manifested, it is clear that no minister who had approved the passage of the bill could advise the king to interpose the executive veto. The ministry cannot veto their own measure, and if they oppose the bill while pending in the House of Commons, they must surrender their office and give way to a ministry in favor of the measure, and hence the bill could not be vetoed.

It thus appears that the formidable prerogatives of the Crown may be paralyzed by the will of the House of Commons — that body which first sat in a separate chamber in 1295, and which, by the leverage of the money power, has overthrown the despotism of the monarchy and paralyzed every exercise of the prerogative not in accordance with their will. The triumph of the bi-cameral Parliament and of the act "*De Tallagio non Concedendo*," in the reign of Edward I., after six centuries, is fully assured.

If it be asked, what if the king, with the temper of the ancient monarchy, should undertake to break the chain by which his prerogative is bound and establish its authority against the liberties of the people and the power of the Commons? the answer is, that all the forms of the Constitution and its laws have secured freedom of speech, freedom

¹ De Lolme on the Constitution, pp. 263-64.

of the press, freedom from arrest, the shield of the *Habeas Corpus*, in the hands of an independent judiciary, and that his efforts of violence would be so flagrantly against right and constitution that the resistance of the people by open rebellion would reinstate the constitutional monarchy and foil the schemes of the usurper. The means of resistance — the material for armies and navies, and the money to support them — would be in the House of Commons. And if the king should be tempted to despise the resistance of the people and hope, by standing armies or otherwise, to overcome it, English history has raised across his pathway the bloody scaffold of Charles I., and the enforced abdication of James II., as a solemn warning against any such attempt. “The power of the people is not when they strike, but when they keep in awe: it is when they can overthrow everything, that they never need to move; Manlius included all in four words, when he said to the people of Rome: ‘*Ostendite bellum, pacem habebitis.*’”¹

§ 99. We have thus far indicated the great influence of the House of Commons, as the representative of the people, in checking the prerogative of the Crown. It is important now to point out what conservative influences exist in the organization of the British government to check the radical tendencies of the popular branch.

First. One of the most potent of these is the patronage of the Crown. He is the source of all official tenure. He appoints the ministry (subject to the power of the House of Commons already referred to), all the judges, and all the officers of the kingdom. When it is considered that each one of these officers is the center of family connections, and that his tenure of office depends upon conserving the government as it is, it will be seen that a large portion of the people of the kingdom will be directly and indirectly under the influence of the Crown, and will tend to conserve the distribution of power between the different departments as established by the Constitution.

¹ De Lolme on the Constitution, p. 219, ch. 14.

Second. The House of Lords, composed of several hundred members, with large landed property, with their tenants and retainers dependent upon them, will have great influence in the election of the House of Commons—an influence which was enormous until the Reform Act of 1832–33, when the “rotten boroughs,” almost under the exclusive influence of the Crown and the Lords, were abolished. Besides, the younger members of the families of the peers, and their connections, would be more or less influenced by their conservative views against any radical action which tended to the subversion of the constitutional relation between the three estates of the realm. This is signally manifested to-day in the strong feeling among the people of the kingdom against any action by the Commons looking to the abolition of the House of Lords or the abridgment of its powers. Besides, as the House of Lords is a co-ordinate branch of the legislative department, no such action against their constitutional power could become a law without their separate consent. And so with reference to the Crown. The veto power, which in ordinary legislation, as we have seen, is never exercised, would unquestionably be exercised, if any action to destroy the Crown as a co-ordinate estate of the realm were taken. Against the popular power, therefore, of the House of Commons, there is thrown the influence of caste in the royal family and in the House of Lords, backed up by the band of officials dependent for their living on the Crown, and the retainers, kindred and friends of the Lords.

Third. The Established Church is an influence antagonistic to all radical reform. When we regard the large number of ecclesiastics who hold their living under this establishment, and who are interested, therefore, in conserving the establishment as a part of the constitutional organism of the realm, it will be readily seen that the ecclesiastics will naturally unite with the Lords and the Crown in obstructing any measures of the Commons which would in any degree impair the existing constitutional power of either one of them.

Fourth. The Colonial System, which makes the British kingdom an empire, enlarges very greatly, not only the patronage of the Crown, but its power in conserving the existing state of things as essential to the empire. Besides this, the Colonial System, which is dependent in a large degree upon the continuance of the empire under the Crown, enlarges the interests of the commercial classes in England, who will see, in the conservation of the existing order of things, assurances of these commercial advantages which result from colonial dependents. Perhaps it may be said that in many respects the colonial system is a burden upon England; but there is no question that in the respects to which we have referred it tends largely to maintain the existing Constitution and to obstruct any radical tendencies of the democratic element in the kingdom. These formidable organizations—the King, Lords, Church and Colonial System, with all their relations affecting the entire society of Great Britain—are potent conservators of the kingdom as it is, and against any revolutionary action which would change it to a democracy.

The history of Great Britain, especially since the Revolution of 1688–89, has presented to the world a memorable example of the organization of its government upon the basis of three estates of the realm, each so powerful in its influence as to make radical change difficult except by revolution; and, as revolution, as has been said, is the last resort of an oppressed people against tyrannical power, the Crown and nobles have been taught a wise discretion in yielding to the demands of the democratic element where it did not radically subvert the Constitution of the kingdom. The wonderful manner in which reforms in the Constitution, as well as legislative reforms, have triumphed in the last century show that the Crown and the Lords have saved themselves from subversion by yielding to the reasonable and conservative demands of the democratic element. And hence, while revolutions during the last century have been rife upon the Continent, they have been stifled in England without the necessity of armed forces to quell popular commotion.

§ 100. We come now to speak of that department of the British Constitution which is entitled to unstinted praise — the Judicial Department. This department, which holds the scales of justice in contests between man and man in civil procedure,— between the Crown and the man in criminal procedure,— which at last must interpose the shield of *Habeas Corpus* and jury trial in behalf of the liberties of the people, assured from *Magna Carta* down to the present time, is appointed by the Crown, and if dependent on the Crown would be but its instrument for destroying liberty and making prerogative paramount.

The judiciary, as we have seen, held their offices during the pleasure of the Crown prior to the Revolution of 1688–89, when, by the Act of 3d William and Mary, the judges held during good behavior, and could not be removed by the Crown, and could only be removed by impeachment by the House of Commons and conviction by the House of Lords, or upon a vote of the two Houses. This made the judiciary independent of the Crown and independent of the people — independent of all influences which would disturb the scales of justice. The only exception to this is the case of the Lord Chancellor, who takes the Great Seal with every new ministry and surrenders it with the resignation of the ministry.

The appointment of the judiciary, though nominally by the Crown, is actually by the cabinet, and practically judges are selected according to the rank which they have obtained by merit among their brethren at the bar. The efficiency of the method by which this merit is recognized by the voice of the bar lies in the appointment of Queen's Counsel, Sergeant, and the like, and by the ministry of each party selecting the chief man of their party at the bar to hold the important offices of Solicitor-General and Attorney-General. When these positions are obtained on the score of conceded merit, they are but the prelude to promotion to the Bench upon the first vacancy that occurs. The men selected for the offices of Solicitor-General and Attorney-General are not only men of large legal ability, but men gifted with pow-

ers of debate on the floor of the House of Commons, to which these officials are generally, if not always, elected. The legal questions which arise in the course of the government, and which become matters for parliamentary inquiry and debate, are left to these two officers for the vindication of the administration in its action.

It is obvious from this outline that the Bench of England is filled with the ablest lawyers, and the experience of the profession will vouch for the fact that the appointment to the Bench by the Crown, through its ministry, has sanctioned the verdict of the profession as to their fitness for the places they fill, and their decisions, on both sides of the Atlantic, are recognized as the deliverances of an able, learned and independent judiciary. Despite occasional criticism upon the decisions of the English courts, the consensus of opinion of the English-speaking profession, on both sides of the Atlantic, as well as elsewhere, is eminently favorable to the judgment just expressed. The appointing power of the Crown is so controlled by the professional opinion of the bar that favoritism, in the long run, will not prevail against merit.

Of course, as Great Britain has no written constitution, which, like our own under the decision of *Marbury v. Madison*,¹ is paramount to all legislation and all acts of all departments of government, the admirable check which we have under our system to the unconstitutional action of the government does not prevail as against the acts of Parliament, which is composed of King, Lords and Commons. The omnipotence of Parliament makes it not only, in the English conception, the legislative department, but the representative of the three estates of the realm, and therefore as the *de facto* Body-politic; but wherever the action of any one of these estates of the realm is separate and distinct from that of the Parliament as a whole, the courts have signally avoided such action when it was contrary to the constitution of the kingdom.

¹ 1 Cranch, 137.

The exercise of royal prerogative contrary to *Magna Carta* was signally defeated by Lord Chief Justice Pratt, in a decision in which the action of a British secretary in ordering the arrest of a citizen without judicial warrant was sternly condemned and annulled. And in the great case of *Stockdale v. Hansard*¹ the power of the House of Commons to order defamatory matter to be published, with immunity to the publisher because of its order, was signally overthrown by the unanimous judgment of the Court of Queen's Bench in the able judgments of Lord Chief Justice Denman and his associates.

§ 101. The judiciary of England springs from the people, though, as judges, they may be made peers of the realm. The Bench is, of course, furnished from the ranks of the bar, and as no peers, as a matter of habit, ever go to the bar, the bar is filled from the ranks of the people. In their origin, therefore, the Bench will be imbued with sympathies for popular liberty and with the power of the people in the House of Commons. Holding office from the Crown, though independent of it, and advanced to the peerage, they will have sympathy with both ranks and all the estates of the realm, which will make them eminently conservative of the governmental organism as well as of the rights of the people.

The supreme appellate tribunal in England, until the last few years, was the House of Lords. If all the Lords sat upon the appeals it would be a tribunal in which unwisdom and ignorance of law would be paramount; but custom rules in this, as in so many other things in the realm. None sat upon the appeals but those known as the "Law Lords," embracing the Lord Chancellor, the peers who were ex-Lord Chancellors, and who were recognized as learned lawyers. At present there has been a modification of this authority in the House of Lords. The appellate tribunal is composed of a select body of the "Law Lords," who sit finally upon the trial of all appeals. Thus, in the final ad-

¹9 Adolphus & Ellis, 1; 36 E. C. L. R. 1.

judication of any question of jurisprudence, the best experience and learning of the profession is secured to constitute the final appellate tribunal.

§ 102. With all of our love for republican institutions and our settled and decided opinion against any system in which hereditary caste is represented in the organism of government, and with all of our views of the social evils which result from such castes in society in association with the people of the kingdom, and with all our preferences for the "American Constitution as the most wonderful work ever struck off at a given time by the brain and purposes of man," we are compelled to pay our tribute of admiration to the British Constitution as the most subtle organism which has proceeded from "progressive history."

The British Constitution, as we have seen, is a thing of growth and evolution — of historic progression. It was not made; it grew. There was none to make it. The people, as such, that is, as a Body-politic, were never heard. It was a strife between departments of a government constructed without popular consent, by the despotic force of human ambition and of lawless conquest. From underneath the very foundations of this abnormal power, the people writhed in the throes of revolt against a tyranny they could not overthrow. Each occasion that Providence offered to lessen the burden or relax the grasp of this unholy alliance of king, peer and priest, they seized and used as best they could. Year by year, generation after generation, from century to century, they broke the prescriptive prerogative which ruled them and checked its ruthless and unbridled dominion. When, by appeal to the justice and magnanimity of an Edward, or to the fears of the craven soul of a John, they were admitted to substantial though subordinate participation in the government, they used this advantage wisely. No step in advance was ever lost. *Nulla vestigia retrorsum.* They could not write in constitutional formularies their annual or centennial gains. But at epochs, and all along their triumphal march, they erected trophies and memorial

monuments in Magna Charta, the Petition of Right, the Declarations and Bills of Rights, Reform Bills, and the like. The people taught lessons to despotism in solemn appeals to their ancient and undoubted rights and liberties, and once in the object lesson of a bloody scaffold for a royal violator of his word and a destroyer of the rights of his people. The British people rolled no Sisyphean stone to the heights of their aspiration for freedom. What they gained they held. And at last they stand upon those heights, with personal rights as secure, and with unwritten muniments of liberty as impregnable, as have ever been the possession of any people, save the inheritors of their free institutions, who have founded the written constitutions of these American States.

§ 103. We may well close our imperfect view of the subtle historic organism of the British Constitution, which is the result of institutional development from which that of America becomes a complete, fixed and supreme Constitution,—a bundle of institutional principles, but a paramount law for government and for men, with the eulogies bestowed upon the British Constitution by Lord Chatham and Daniel Webster.

Lord Chatham said: "The poorest man in his cottage bids defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter! But the king of England cannot enter! All his forces dare not cross the threshold of the ruined tenement."

Daniel Webster said: . . . "The power which has dotted over the surface of the whole globe with her possessions and her military posts! Whose morning drum-beat, following the sun and keeping company with the hours, circles the earth with one continuous and unbroken strain of the martial airs of England!"

CHAPTER V.

AMERICAN CONSTITUTIONAL DEVELOPMENT.

§ 104. We pass from the consideration of British institutions to American Constitutions. In order to obtain a full understanding of these we must recur to the historic period in which these American States had their origin, their development, and their final relationship as members of the union of States under the Constitution of the United States.

§ 105. The nature of the Constitution of the United States can only be ascertained by a precise delineation of the history of these States during their primeval condition, and their subsequent relationship down to the present time. It is a matter of history, not of myths — of fact, not of theory. We shall therefore consider only the historic facts, discarding all theories which do not rest upon a historic basis.

§ 106. On the nature of the Constitution of the United States and the relations of the States to the Union, there are two leading schools of thought:

First. That the unit of sovereignty is the State, which is a Body-politic; that the Constitution of the United States is a compact between these sovereign units and Bodies-politic, making a Federal Union between the States; that the organic Federal force of the Federal Union is the Federal Government, to which, by the Constitution of the United States, the States, separately and in combination, have delegated powers, reserving the residuum of powers not so delegated to the United States, nor prohibited to the States, to the State governments, or to the people of the States, respectively.

Second. The second school holds that the Union is itself

the unit of sovereignty, of which the States are subordinate parts, to which certain powers belong under the Constitution of the United States, while the main powers belong to the National Government.

Under the first view the Union is a multiple of units; under the second, the Union is a unit of which the States are fractions. At the head of the second school, Judge Story is *primus inter pares*, and following him we have, in the present day, von Holst, Burgess, Hare, Pomeroy, and a number of others.

Von Holst deals with history thus: He reads the facts of the period of 1776 to 1789, not from the historic and actual view of the actors in that period, but from the subjective view of the actors in the period from 1861 to 1865, and instead of taking the facts as he substantially concedes them to exist in the period of which he treats, he substitutes for them mythical interpretations of those facts a century after they occurred, thus reversing the method of Niebuhr, the master historian of his own country, who rejected the myths of the later period and substituted for them facts as they really occurred, ascertained by his laborious research. He says that "the American Dictionary of Constitutional History is written in two parallel columns," one of which he admits to be a detail of the facts as they actually were during the period from 1776 to 1789, and the other the truer view of the condition of things during that period, which did not occur to those who were actors in that period, but as they came to be seen by the men of a century later; and thus, instead of giving us the results of profound research into the facts of pre-constitutional history, he rests his whole theory, not upon real records, but upon the statements of them in the work of Judge Story, and upon the analogy which President Lincoln presents between the relations of the Union to the States and those of the State to the counties composing it. This extraordinary process adopted by the German historian of our American institutions will be disregarded in this work. We shall rest the maintenance of the

views taught in the first school of thought, above referred to, upon the deep and incontrovertible and immovable foundations of our whole history.

It may be well here to say that if a written Constitution, adopted by our ancestors in 1789, with their then clear view of the environment of facts which influenced their action, is to be changed radically by an interpretation of what those facts, according to the subtle analysis of a German historian a century later, ought to have meant, then written constitutions are no longer fixed and paramount, but may be set aside and annulled by the fancies and ingenious preferences of subsequent generations. The written Constitution of 1789 must be what those who brought it into being and gave it the sanction of their ratification believed and knew it to be, and cannot be changed by what men a century thereafter choose to think it ought to have been.

§ 107. We approach then the history of the adoption of the American Constitution. In order fully and clearly to accomplish our purposes, we will divide the subject into five historic eras:

I. The Colonial Era, from 1607 to September 5, 1774, the date of the meeting of the first Continental Congress.

II. The Continental Congressional Era, from September 5, 1774, to March 1, 1781.

III. The Confederation Era, from March 1, 1781, to March 4, 1789.

IV. The Constitutional Era, from March 4, 1789, to 1861.

V. The Constitutional Era since 1861.

I. THE COLONIAL ERA, FROM 1607 TO SEPTEMBER 5, 1774.

§ 108. The discovery of America in 1492 furnished a great stimulus to colonization. We have seen already that the original Teutonic races sprang from the Aryan migration from the slopes of the Caucasus before the Christian Era; and that the migration of the Angles, the Saxons and the Jutes in the fifth century to Great Britain established the Saxon commonwealth on that island; and that the Nor-

man migration, resulting in the conquest of 1066, based the civilization of our fatherland upon the character of races alien to it after the almost entire extinction of the aborigines. It is not surprising, therefore, that these migratory races, which in the course of centuries found themselves with a crowded population upon the soil of their native kingdom, should have reached out upon the discovery of a new continent for new homes and for a new arena for national development.

Henry VII., in 1495, granted a commission to John Cabot, a Venetian then living in England, to proceed on a voyage of discovery in the name and for the benefit of the British crown. In the succeeding year Cabot discovered the coast of the American Continent from the 56th to the 38th degree of north latitude, and claimed for his sovereign the region which stretched from the Gulf of Mexico to the most northern regions.¹ Other expeditions followed in later times, one being led by Sir Humphrey Gilbert, another by Sir Walter Raleigh, and thus Great Britain claimed the entire continent from the Atlantic coast to the Pacific Ocean. These commissions only authorize the taking possession of territory not occupied by another Christian power, which indicated "the right to take possession, notwithstanding the occupancy of the natives, who were heathen, and at the same time admitting the prior title of any Christian people who may have made a previous discovery."²

In the comprehensive opinion of Chief Justice Marshall in *Johnson v. McIntosh*,³ the doctrine upon which the United States claimed title to this country is as follows: "The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold and assert in themselves the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy either by purchase or by

¹ 1 Story, Comm. on Const., sec. 1.

³ 8 Wheat. 543.

² Chief Justice Marshall in *Johnson v. McIntosh*, 8 Wheat. 543.

conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise."

The general doctrine of the right of a civilized nation, which discovered a territory occupied by heathen savages, to obtain as against all other civilized nations the preferable right to such new territory as against the heathen occupants, and the pre-empted right to extinguish the title of the heathen occupants, upon such terms, by treaty or conquest, as to the civilized nation would seem best,—however harsh it may seem in its broad statement, or may have been in its practical application,—stands upon sound principles of natural law and of intergential law. If the world be given by the Creator for the benefit of the human race, it can hardly be maintained that a few hundred thousand savages can claim a perpetual title to an entire continent, to be used by them as a theatre of nomadic life, without the cultivation of the soil or the improvement of its resources for the benefit of mankind, against the equal claim of crowded populations, who, by bringing the methods of civilized life to bear upon this new continent, could make the savages circumscribe the area of their occupation and subject that area to the methods of civilized life, without abridgment of their natural rights and with really an increase of happiness and well being. The doctrine *sic utere tuo ut non alienum laedas* would compel the savage to limit his occupations within an area which would not diminish his happiness, so as that the unused domain might be subjected to civilized methods for the benefit of the crowded populations of the world. But be this as it may, the doctrine of the rightful possession of the American continent by the different British colonies settled upon it has been so long recognized and enforced that it is needless to discuss it further. A full discussion of it will be found in the cases above referred to.

English colonization began during the reign of James I.: the first at Jamestown in Virginia in May, 1607, the other at Plymouth Rock in Massachusetts in December, 1620.

These colonists brought with them the spirit of British freedom, exalted in its courage by the bold temper which freedom inspires and enhanced by adventurous enterprise. A new continent, without fixed institutions, without king, nobility, or ecclesiastical authority, was open to the fresh impress of the sons of civilized life who landed upon its shores. All the bands of the old and established society of the mother country were loosened, and the colonial mind, free from the environment of ancient prejudices, was prepared for an order of things more natural and therefore more true. The scion of the ancient tree of liberty could better grow unchoked by the weeds of privilege and prerogative, in the soil, and drinking in the balmy air, of this virgin continent. As Lord Bacon has it, "No tree is so good first set, as by transplanting." Young and bold men—men tired of old habits, customs and thoughts, yearning to throw off the restraints of an ancient and effete social order (as the religious reformation had shaken the foundations of the ancient church), and to find full scope for the enterprises of life, and to impress themselves upon a new and unformed empire,—*these* were the colonists that braved the rock-bound coasts of New England and plunged into the untrodden wilderness of tide-water Virginia. They panted to be free, and could not be enslaved! The history of each colony will show that its people held with a clear comprehension and vigorous grasp all the fundamental principles of Magna Carta.

§ 109. There were three forms of colonization:

First. By conquest or cession from a Christian power. In this case the prior laws prevailed until changed by the Crown of England. This was the case of New York as ceded by Holland.¹

Second. By conquest or cession from an infidel power. Here it was doubtful if any prior laws continued; certainly none which were contrary to the law of God.²

¹ Calvin's Case, 7 Coke, 17b; Atty. Gen. v. Stuart, 2 Merivale, R. 158; v. Galy, 2 Salk. 411; s. c., 4 Mod. 222; Campbell v. Hall, Cowp. 211. ² Same cases as note 1; Blankhard

2 P. Wms. 75.

Third. Colonization of an unoccupied country, or one vacated by the original people.

Though in *Smith v. Brown*¹ Lord Holt thought otherwise, yet in other cases the better opinion has prevailed that the American colonies come under this last form of colonization, and thus have been held to have brought with them the English law at the time of their settlement.² Blackstone held that our American plantations were principally colonies by conquest or cession of the countries to Great Britain, and that therefore the Common Law of England as such has no authority there,—they being no part of the mother country, but distinct, though dependent, dominions. Judge Tucker in his “Commentaries”³ controverts this doctrine, and shows that the colonists brought with them to Virginia the Common Law of England and all statutes or acts of Parliament made in aid thereof prior to the 4th year of James I. This opinion of Judge Tucker is sanctioned by the decision of *Johnson v. McIntosh*, and by the whole of our revolutionary history, and by the uniform concurrence of American decisions. An interesting statement of the origin and settlement of Virginia, of New England, including Massachusetts, New Hampshire, Connecticut, Rhode Island, Pennsylvania, New Jersey, New York, Delaware, North and South Carolina, will be found in Story’s Commentaries on the Constitution, pages 21 to 183. References to these historic questions will be made where necessary in the sequel.

Blackstone states in reference to colonization that colonies are “no part of the mother country, but distinct, though dependent, dominions.”⁴ Each colony brought with it all the English laws then in being, which are the birth-right of every subject, and are immediately there enforced.⁵ In consequence of this, each colony was a dominion distinct from

¹ 2 Salk. 668.

² Vol. I, Book 1, pp. 7 and 8.

³ Cases above referred to; *Rex v. Brampton*, 10 East, R. 282; *Johnson v. McIntosh*, 8 Wheat. 543; 1 Story’s Comm. on Const., § 152.

⁴ Book I, p. 108; 1 Stephen’s Comm. Const., pp. 103, 104.

⁵ Blackstone, Book I, p. 107; *Blankard v. Galy*, 2 P. Wms. 75.

and no part of any other, and though each was dependent on Great Britain it was independent of every other. No colony had a part in the British government, and *a fortiori* exercised no influence upon the policy of the sister colonies. As to the power of the parent country several opinions prevail. In all it was conceded that the king could not legislate for these American colonies.

"The right of legislation," says Mr. Stephen, "is in some cases vested in the crown; for any colony which has been acquired by conquest or cession is subject to such laws as the sovereign in council may impose."¹ And he adds: "This does not extend, however, to colonies acquired by occupancy; for in these the crown possessed no such legislative right."

The power of Parliament to legislate for the colonies was, however, a different question. Lord North and his adherents enacted in 6th George III., chapter 12, that Parliament could legislate for the colonies in all cases whatsoever. Many others, Edmund Burke among them, conceded the power to Parliament to legislate upon all subjects affecting the interest of the British empire and its general commerce; while others denied all such power of legislation for the colonies.

Without attempting to settle this mooted and now unimportant question, there can be no doubt that the reservation contained in many of the charters, that colonial legislation should not be "contrary to the laws and statutes of our realm of England and to the general commercial regulations by Parliament," acquiesced in by the colonies, as well as the practice of Parliament since our Revolution with respect to other colonies,² and the Parliamentary power exercised in the abolition of slavery in the colonies by the act of 3d and 4th William IV., chapter 73, compels the admission of some legislative power in Parliament over the colo-

¹ Stephen's Commentaries, vol. 1, p. 105; Calvin's Case, *supra*; Campbell v. Hall, *supra*.
² 1 Stephen's Commentaries, 106; 18th George III., ch. 12, 1778.

nies. But truth and justice demand that we should repudiate with our forefathers the right of taxation claimed by the Parliament in the colonies, and hold that the sole power of taxation for each colony was in its own distinct colonial assembly.

§ 110. Grotius thus defines a colony: "When a people by one consent go to form colonies, it is the origin of a new and independent people, for they are not sent out to be slaves, but to enjoy equal privileges and freedom."¹ That this defines the nature of the British colonies will appear from many considerations. The settlement of these different colonies and their primal governments may be first considered.

§ 111. The Colony of Virginia was the first of these settlements. She was named before her birth in Edmund Spenser's dedication of the "*Faerie Queene*," to "*Elizabeth, by the grace of God, Queene of England, France, Ireland and Virginia*." The first settlement under her charter of April 10, 1606, was on the Powhatan River, in May, 1607. By this and subsequent charters two colonies were formed. The first was directed to settle between the 34th and 41st degrees of north latitude, and the second between the 38th and 45th degrees,—with this proviso, that the "latter was not to be within an hundred miles of the prior colony." No person was to settle in either colony without the consent of the council in writing.² A later charter gave power to establish a government for Virginia, named a large number of corporators, who were made a corporation or Body-politic; gave them power to take out any other colonists they chose, and to admit and expel members and keep out intruders, etc.³

Sir George Yeardley, then Governor of the Colony to quiet the uneasiness of the colonists because of the lack of popular authority in the government, in April, 1619, called a general assembly, composed of representatives from the

¹ *De Jure Belli et Pacis*, liber 2, ch. 9, § 10.

² *Henning's Statutes at Large*, p. 57, etc.

³ *Id.*, p. 91, etc., and p. 98, etc.

various plantations in the colony, for purposes of legislation. This was the first representative legislature that ever sat in America.¹

In 1621, July 24th, a regular government was constituted by ordinance, composed of the Governor, Council and the House of Burgesses elected by the people,² and this General Assembly was granted free power as to all matters concerning the weal of the said colony, and to make, ordain and enact such general laws for the behoof of the said colony as shall appear necessary or requisite.³ This was the first embryo civil Body-politic in America, dependent upon, but distinct from, the parent country, with a nucleus about which it could aggregate the materials for an organism and exclude such as it pleased. This was the foetal commonwealth, or germ of a new state. In 1623-24 the House of Burgesses by law asserted that the Governor "shall not lay any taxes or imposts upon the colonists, their lands or commodities, other-way than by the authority of the General Assembly, to be levied and employed as the said Assembly shall appoint."⁴ This law was re-enacted in 1631 and in 1632.⁵ It was repeated in 1642,⁶ and it was again repeated with emphasis in these words: "And further it is enacted and confirmed that no levies be raised within the Colony but by a General Grand Assembly."

It will be seen that this assertion of popular power over taxation and appropriation — the key-note of British liberty and the prophetic announcement of the American Revolution — preceded the beginning of the conflict in England between the Commons and the King upon the Petition of Right in 1628, and upon "ship money" in 1636-37, and was repeated from time to time, the last time being in 1645-46,

¹ Robertson, *America*, Book 9; Campbell, *History of Virginia*, p. 139.

² 1 Henning's *Statutes at Large*, p. 110.

³ *Id.*, p. 112.

⁴ *Id.*, pp. 112, 113.

⁵ *Id.*, pp. 171, 196.

⁶ *Id.*, p. 244.

when the war was flagrant between the King and Parliament.

After the death of Charles I. and the establishment of the commonwealth in March, 1651, a treaty was agreed on "by the commissioners of the council of state by authority of the Parliament of England, and by the Grand Assembly of the Governor, Council and Burgesses of that country" (meaning Virginia). By this treaty it was agreed that Virginia and her inhabitants should remain in due obedience and subjection to the commonwealth of England according to the laws there established, "and that this submission and subscription be acknowledged a voluntary act, not forced nor constrained by a conquest upon the country, and that they shall have and enjoy such freedoms and privileges as belong to free-born people of England: That the Grand Assembly, as formerly, shall convene and transact the affairs of Virginia so that nothing be done contrary to the government of the Commonwealth of England: That Virginia should enjoy her ancient bounds and limits granted by the charters of former kings; that the people of Virginia have free trade, as the people of England do enjoy to all places and with all nations according to the laws of that Commonwealth; and that Virginia shall enjoy all privileges equal with any English plantations in America: That Virginia shall be free from all tax, custom and imposition whatsoever, and none to be imposed on them without the consent of the Grand Assembly, and so that neither forts or castles be erected or garrisons be maintained without their consent."¹

During the period of the Commonwealth of England, Virginia elected her own governor, and on the death of Richard Cromwell her Assembly declared: "The supreme power of government of this Country shall be resident in the Assembly;" that all writs should issue in its name "until such a command and commission come out of England as shall be by the Assembly adjudged lawful."²

¹ 1 Henning's Statutes at Large, p. 363, etc. ² Id., p. 526.

Thus facts establish not only the original distinctness of the colony of Virginia from all subsequent colonies thereafter established, but show that her independent action by treaty with the Parliament of England established for her complete autonomy in the matter of taxation and in the matter of any garrison established in her borders, except by her consent; and furthermore, that she assumed to herself the power of determining upon the legitimacy of the authority that came out from England after the expiration of the Protectorate.

§ 112. Take now the case of Massachusetts:

On the 11th of November, 1620, the Pilgrim Fathers, before landing, entered into the following agreement, signed by forty-one persons, though the whole number of men, women and children amounted to one hundred and one. The terms of this celebrated paper are here quoted in full:¹

“In the name of God, amen. We, whose names are underwritten, the loyal subjects of our dread Sovereign Lord, King James, &c., having undertaken, for the glory of God and advancement of the Christian faith, and honor of our King and country, a voyage to plant the first Colony in the northern parts of Virginia, do, by these presents, solemnly and mutually, in the presence of God, and of one another, covenant and combine ourselves together, into a civil Body-politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute, and frame such just and equal laws and ordinances, acts, constitutions and officers, from time to time, as shall be thought most meet and convenient for the general good of the colony; unto which we promise all due submission and obedience.”

They obtained afterwards, in 1629, a patent from the Council established at Plymouth, in England, in which they were authorized to make laws for the government of the people. They continued to act under this authority until all charters were overthrown in 1684, and finally, by a charter

¹ 1 Pitkin's History, pp. 32, 33.

granted to Massachusetts by William and Mary in 1691, they were incorporated into that province, and so continued from that time. It is curious to note some of their legislation, in which they clung to the doctrines of *Magna Carta*, and jury trial. Their criminal code was based largely upon the Mosaic system, in which the crimes of idolatry, blasphemy, witchcraft, cursing and smiting father and mother were made capital offenses along with murder, treason, rape, and the like.¹

The Colony of Massachusetts was constituted under a charter to the Duke of Lenox and others, with very large powers and with extensive territory, and with complete power over all the people of the Colony, and to regulate trade and traffic to and from the Colony, and to prohibit the same to all persons not licensed by the Corporation. Afterwards the whole power under the charter, which had originally been conferred upon the company resident in England, was transferred to New England itself. The Colony was called Massachusetts Bay.

With the fall of the colonial charter in 1684, a new charter was granted in 1691 to Massachusetts Bay, and thenceforth it became a province acting under the government established by this charter until the Revolution. The peculiarity of their legislation was, like that of the Plymouth Colony, based upon the Mosaic code.²

In 1636 the Plymouth Colony declared against all taxation but "by the consent of the body of freemen or their representatives legally assembled."³ In 1661 Massachusetts made the same declaration, and the Assembly of Rhode Island in 1663-64, and Maryland in 1650, did the same.⁴

New Hampshire was established under a grant in 1629 from the council of Plymouth. This grant was subsequently contested by Massachusetts, the question was heard before the king in council in 1679, and the claim of Massachusetts was adjudged invalid, and New Hampshire as a distinct

¹ 1 Story's Comm., § 59.

² Id., ch. 4.

³ 1 Pitkin's History, p. 89 *et seq.*

⁴ Id.

province was recognized. A commission was in that year issued by the crown for the government of New Hampshire.¹

The establishment of the other colonies, Connecticut, Rhode Island, Maryland, New York, New Jersey, Pennsylvania, Delaware, North and South Carolina and Georgia, are interesting and will be found summarily stated in 1 Story's Commentaries, pages 7 to 15, inclusive. This summary shows, without any exception, that each one of these colonies was established upon a distinct and independent foundation, with distinct and independent powers of taxation and internal polity, and with some power of regulating its trade and commerce with other colonies and with the world. Among these New York may be mentioned for a difference between it and the others in one respect: that it was once claimed as a colony of Holland, but was acquired by treaty in 1667 and became an English colony under patent to the Duke of York in 1664 and 1674. This Hollandic origin differentiates New York from all the others, and has perpetuated in that great State many traces of Hollandic institutions and customs.

A general statement upon this subject may be summarized from a letter supposed to have been written by Edmund Burke, dated May 19, 1774, in which, speaking of the colonies, the author says: The crown, "by most solemn compacts, did form them into separate civil systems, with all the powers of distinct legislation and government; that it was manifestly the royal intention to form those colonies into distinct states dependent on the crown but not on the Parliament of England." He adds, their history "fully demonstrates that they were really and intentionally created distinct states and exempt from the authority of Parliament, and nothing but an act of union made with their own consent can annex them with the realm or subject them to its legislation."²

§ 113. But this complete colonial distinctness is shown by the diverse forms of their governments. These forms

¹Story's Commentaries, ch. 5.

²American Archives, 4th series, vol. I, p. 337.

were three-fold: Provincial, Proprietary, and Charter governments.

The Provincial establishment depended on the commission issued by the crown to the governor and the instructions which usually accompanied the commission. This commission usually appointed a governor as the king's deputy. The crown also appointed the council, which constituted one branch of the legislature, and were also to assist the governor in the discharge of his official duties. The commission also contained authority to convene a general assembly of representatives of the people, and thus a general assembly, composed of governor, council and representatives, was constituted, which assembly had the power to make laws not repugnant to the laws of England and subject to the crown's assent or dissent. This was the form of government for the provinces of New Hampshire, New Jersey, Virginia, North Carolina, South Carolina and Georgia.

The Proprietary governments were those granted by the crown to individuals in the nature of feudatory principalities, with all the subordinate powers of legislation which formerly belonged to the owner of the counties palatine. In this proprietary government the governors were appointed by the proprietaries, and legislative assemblies were convened by their authority, and the proprietaries exercised the usual prerogatives which in provincial governments belonged to the crown. The three colonies subject to this form of government were Maryland, Pennsylvania and Delaware.

Charter governments are "in the nature of civil corporations, with the power of making by-laws for their own internal regulations not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters of incorporation. They have a governor named by the king (or in some proprietary colonies by the proprietor), who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the king and council here in England. Their

general assemblies, which are their House of Commons, together with their council of state, being their upper house, with the concurrence of the king or his representative, the governor, make laws suited to their own emergencies.”¹

Judge Story thinks that this description by Blackstone is not correct; that the charter governments were not merely civil corporations, but were “great political establishments, possessing the general powers of government and rights of sovereignty, dependent indeed and subject to the realm of England, but still possessing within their own territorial limits the general powers of legislation and taxation.” This modification by Judge Story of the description given by Blackstone is doubtless correct, and the two constitute a fair description of the character of these Charter governments.

The colonies which were subject to Charter governments were Massachusetts, Rhode Island and Connecticut. Connecticut continued under its charter until 1818, and Rhode Island until within the last decade.

§ 114. The fundamental laws of the colonies differed essentially. Each brought with it the Common Law of England, and the statutes modifying the same passed up to the date of its settlement; thus each colony brought with it the Common Law with diverse statutory modifications.

We have already adverted to the fallacious view which Blackstone takes of the Common Law of England becoming a part of the law of each of the colonies. In addition to what has already been said upon that subject, we may refer to the views of Judge Story condemnatory of the doctrine of Blackstone.² The resolutions of Congress, October 14, 1774, may also be consulted.³

New York had at the time of its cession to England Hollandic laws, which existed as valid laws, except as superseded or modified by the English government.

¹1 Blackstone, Bk. I, p. 108.

³1 Journals of Congress, p. 26.

²1 Story on the Constitution, ch. 17.

This fundamental body of law, the Common Law of England as it existed at the date of the settlement of the colony, was subject to change by the legislature of the colony, and therefore at the date of the Revolution each colony was governed by a separate system of laws composed of the Common Law as it was in each at the date of settlement, modified by the separate and distinct legislation of each after settlement. No Parliament, and *a fortiori* no other colony, could or did intrude its voice in the enactment of these statutes of each colony, so that the original distinctness of the colonial systems of laws was perpetuated through the distinctness of the diverse colonial governments of each separate and distinct colony.

§ 115. But the essential distinctness between the colonies as political organisms is manifested in the regulation by each, not only of its internal polity and taxation, but of great questions of sovereign power in each, which manifests the functions of a supreme sovereign. We will present a series of such acts by the Colony of Virginia, which doubtless find their parallel in the legislation of the other colonies.

The regulation of foreign commerce and the requirement that all persons take oaths of supremacy and allegiance, as early as 1631-32:¹ Grant of freedom in trade to the subjects within the Kingdom of England (1644-45):² Treaty with Maryland, allowing freedom of trade to her people within the Colony of Virginia, ratified by the General Assembly in 1642:³ Regulation of the Dutch trade and duties laid upon the exports of tobacco (1657-58):⁴ Denizations of aliens upon an oath of fidelity to the government of Virginia:⁵ A general act of naturalization in 1671, confining it only to Virginia, "beyond which this Grand Assembly pretend to no authority of warranting its sufficiency:"⁶ Laws in reference to the ex-

¹ Henning's Statutes at Large, pp. 166, 191.

² Id., p. 296.

³ Id., p. 276.

⁴ Id., p. 469.

⁵ Id., p. 486.

⁶ 2 Henning's Statutes at Large, pp. 290, 464, 465.

portation of goods;¹ and export duties thereupon:² An act (1705) of naturalization confirming titles to land purchased of aliens:³ Duties on tonnage and port duties:⁴ An act establishing quarantine regulations in 1722:⁵ Regulation of the rate at which different species of gold coins shall be current and legal tender:⁶ Regulation of silver coins:⁷ An act making it treason to counterfeit any such coin:⁸ Treaties between the Colonies of Virginia and Maryland:⁹ A levy of Virginia troops, upon the request of his Majesty, to aid him in his war against Spain:¹⁰ Impressment and enlistment of soldiers: Additional duties levied on slaves to aid in the war:¹¹ Appropriation of money for the support of said troops and the borrowing of money for the purpose, and the pledge of duties on certain articles as security for the loan:¹² Prohibition of the bringing into the colony of horses from any other colony, without license from Virginia:¹³ The erection of a light-house at Cape Henry, and the levy of a duty to be paid by all ships coming into the Bay of the Chesapeake:¹⁴ Issue of treasury notes during the French war, and the pledge of duties imposed by the act as security for their redemption:¹⁵ A levy of duties on slaves brought from Maryland, Carolina, or the West Indies:¹⁶ The making treasury notes legal tender for debts contracted subsequent to their issue:¹⁷ A levy of an additional duty on rum imported from any other country than Great Britain, or some of his Majesty's sugar colonies.¹⁸ Acts declaring what shall constitute treason against

¹ 2 Henning's Statutes at Large, pp. 124, 125, 127, 128, 179, 216, 287, 498, 261, 338.

² Id., pp. 130, 176, 466, 283.

³ 3 Henning's Statutes at Large, p. 434.

⁴ Id., pp. 345, 491.

⁵ 4 Henning's Statutes at Large, p. 99.

⁶ Id., p. 51.

⁷ Id., p. 218.

⁸ Id., pp. 219, 220.

⁹ 2 Henning's Statutes at Large, pp. 190, 191, 200.

¹⁰ 5 Henning's Statutes at Large, pp. 94, 95.

¹¹ Id., pp. 92, 93.

¹² Id., p. 93.

¹³ 6 Henning's Statutes at Large, p. 124.

¹⁴ Id., pp. 227, 228.

¹⁵ 7 Henning's Statutes at Large, p. 18.

¹⁶ Id., p. 338.

¹⁷ Id., pp. 336, 351.

¹⁸ Id., pp. 274, 646.

his Majesty and the government of Virginia were passed from time to time during all her history. Virginia, in 1705, enacted that no person should hold any office within Virginia until he had been a personal resident in the same for three years, reserving to *natives* of Virginia, without such residence, the power of holding office.

This recital of the continued exercise of those sovereign powers which belong to independent nations, by the Colony of Virginia, and doubtless by the other colonies, during the whole period to the Revolution, establishes beyond doubt that, except as subject to the power of the crown, of which it was a dependency, each colony was a separate, though dependent, nation.

§ 116. In 1643 the separate colonies of New England—Massachusetts, New Plymouth, Connecticut and New Haven—formulated articles of Confederation for offense and defense, upon terms that left to each of these colonies the exercise of their *peculiar jurisdiction and government within their limits*. This Confederation secured these colonies from the incursions of the Indians and the claims of the Dutch, but at the dissolution of all the charters in 1684 it was finally dissolved. “This little Confederacy was not without its difficulties and disputes among the members, which at times threatened its dissolution.”¹ The jealousies felt by the several members of this little Confederacy of the action of the centralized power were prophetic of the later events in our history, and indicated a resentment of anything which took away from any one of the colonies its separate and independent right to regulate its own internal polity.

§ 117. During the reign of William and Mary the government of England set on foot a plan of general defense, by which the quotas of each colony were assessed in the ratio of its population, and this scheme was forwarded to the different governors with directions to recommend it to the several assemblies for adoption. The plan was proposed to the legislature of Virginia by its governor, Sir Francis Nichol-

¹ Pitkin's History, p. 50, etc.; and a copy of the Articles, Id., p. 423, etc.

son, and was strenuously urged upon the legislature for adoption. The legislature refused with decided emphasis. It is interesting to note that the scheme involved the representation of each province by deputies to meet and form a congress. This is the first use of the word in our history.

All efforts to establish such a union, even for the limited purposes of protection to each and all the colonies, found no favor and it was rejected; affording clear evidence that during the colonial period they were not only entirely distinct and separate in their political existence, but so repellant as jealously to reject all plans of union.¹

§ 118. In 1753, however, the British government proposed a plan of union in a letter from the Secretary of State. A number of commissioners met at Albany from New York, New Hampshire, Massachusetts, Connecticut, Rhode Island, Maryland and Pennsylvania. The plan of this union was for their mutual defense and security, and for extending British settlements in North America. The proceedings of this meeting of commissioners, and the plan which was formulated for this union, are detailed by Pitkin.² The impulse to this proposition grew from the impending French war, and the unanimous declaration of the commissioners was that a union of the colonies was absolutely necessary for their protection. Dr. Franklin was a member of the committee which drew the plan of union, and to his pen it is to be ascribed. The scheme received the consent of all the commissioners except those from Connecticut. It was rejected in England because it left too much power with the colonies; in America, because it transferred too much power to the crown. This scheme not only was predicated upon the entire separateness of the different colonies, but that no general government for them could be adopted without the consent of each and all of them.

The passage of the "Stamp Act" and the strained rela-

¹ Pitkin's History, 141, 142; 2 ² Pitkin's History, 142, and
Burk's History of Virginia, 322, etc. Appen., Id. 429, etc.

tions between the mother country and the colonies, due to the exercise of that power, gave rise to a movement in 1765 for a meeting of the colonies, through committees from the house of representatives of each of the several colonies, to consult upon the crisis in colonial affairs. The commissioners met in New York in 1765. All the States except New Hampshire, Virginia, North Carolina and Georgia were represented. They issued a Declaration of Rights, in which they declared that they were entitled to all the inherent rights and liberties of natural-born subjects of the British kingdom; "that it is inseparably essential to the freedom of a people and the undoubted right of Englishmen, that no taxes be imposed on them but with their own consent, given personally or by their representatives;" "that the people of these colonies are not, and from their local circumstances cannot be, represented in the House of Commons of Great Britain; that the only representatives of these colonies are persons chosen therein by themselves, and that no taxes ever have been, or can be, constitutionally imposed upon them but by their *respective* legislatures; that all supplies to the crown being free gifts from the people, it is unreasonable . . . for the people of Great Britain to grant to his Majesty the property of the colonists."¹

§ 119. But the most formidable and powerful statement of the relations of the colonies among themselves and to Great Britain is found in the memorable declaration of the First Continental Congress, October 14, 1774.² This declaration declared "the free and exclusive power of legislation" to be "in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity." . . . "That the respective colonies are entitled to the Common Law of England" and all its great and inestimable privileges, . . . and to such "immunities and privileges granted and confirmed to them by royal charters or secured by their several codes of provincial laws." . . . That a standing army in time of peace in

¹ Pitkin's History, Appen., 447. ² Journals of Congress, 27-29.

any colony, without the consent of its legislature, is against law. . . . And that these indubitable rights and liberties cannot be taken away from them or abridged, "without their own consent, by their representatives in their several provincial legislatures."

This declaration by the colonies, on the threshold of their first union, of the entire separateness and independence of the political existences of the several colonies, and the absence of all claim on the part of the Congress of any power in the union of the colonies, except as derived from the separate authority of each, is an authoritative confirmation of the fact that these colonies were embryo commonwealths, totally independent of each other, and only dependencies on the crown of Great Britain. Subject to that dependency, they were, in all respects which constituted the sovereignty of nations, complete commonwealths, subject to no external authority in the world except the authority of the government of Great Britain.

§ 120. These conclusions, after this full review of the facts, are sanctioned by very high authority.

Judge Story declares: "For all the purposes of domestic and internal regulation, the colonial legislatures deemed themselves possessed of entire and exclusive authority. . . . The colonial legislatures, with the restrictions necessarily arising from their dependency on Great Britain, were sovereign within the limits of their respective territories. . . . All the colonies considered themselves, not as parcel of the realm of Great Britain, but as dependencies of the British crown, and owing allegiance thereto, the king being their supreme and sovereign lord. . . . Though the colonies had a common origin and owed a common allegiance, and the inhabitants of each were British subjects, they had no direct political connection with each other. Each was independent of all the others; each, in a limited sense, was sovereign within its own territory. There was neither allegiance nor confederacy between them. The assembly of one province could not make laws for another, nor confer privi-

leges, which were to be enjoyed or exercised in another, further than they could be in any independent foreign state. As colonies they were also excluded from all connection with foreign states. They were known only as dependencies.”¹

Mr. Curtis² says: “The colonies had no direct political connection with each other before the Revolution commenced, but each was a distinct unit, with its own separate political organization, without any power of legislation for any but its own inhabitants.”

This emphatic declaration of Judge Story, followed by Curtis, would be injurious to the theory which Judge Story so persistently asserts of the sovereignty of the Union of the States and the subordination of the States to that Union. Accordingly we find that Judge Story has added this qualification: “But, although the colonies were independent of each other in respect to their domestic concerns, they were not wholly alien to each other. On the contrary, they were fellow-subjects, and for many purposes one people. Every colonist had a right to inhabit, if he pleased, in any other colony; and, as a British subject, he was capable of inheriting lands by descent in every other colony.”³ This passage is justly subject to criticism, for it is not pretended that the law of inheritance in any colony was fixed by any other authority than that of its colonial legislature. A Briton may now inherit land in Virginia under our act of 1867, but he inherits by virtue of Virginia law, and his power to do so does not make a Briton and a Virginian fellow-citizens of Virginia. The right to inherit land depends not on community of citizenship, but on the *lex loci rei sitæ*; and heirship to land must be traced by that law. Thus a Scotchman, though not an alien in England, since Scotland and England are now one kingdom, cannot inherit land of his father in Eng-

¹ 1 Story's Comm., secs. 168, 171, 175, 177.

³ 1 Story's Comm., sec. 178; 1 Curtis' History of the Constitution of

² History of the Constitution of the United States, p. 9.
the United States, pp. 7, 8.

land, though legitimate by Scotch law, if illegitimate by English law.¹

The capacity to inherit or hold land in a colony, as in England, was due to the tie of allegiance. In Calvin's case,² when Scotland and England were two separate kingdoms with a common king, James I. of England, who was James VI. of Scotland, and when there was no political ligament but the common crown, and the two kingdoms were not one people, it was held that Calvin, a Scot, could hold land in England by virtue of his allegiance to the person of the king of both countries. So that the test applied by Judge Story to establish that the colonies were, in this sense of capacity to inherit, one people, fails utterly. It is no test at all. It depends on a fact having no relation to the oneness of the people of the colonies. For, in the one case above cited, inheritance did not follow from the oneness of Scotland and England, yet in the other it resulted because of the common tie of allegiance to one king, when there was entire separateness between the two kingdoms.

Nor is it true that by the original terms of the charters of the colonies a citizen of one could, without the consent of the other, settle in that other.³ But even if he could, the right was derived from allegiance to a common crown. But the legislation that has been already referred to settles this question.

In 1779 Virginia defined citizenship, and gave "to the free white inhabitants of every of the states, parties to the American Confederation, paupers, vagabonds and fugitives from justice excepted," all rights of citizenship within this commonwealth.⁴ The grant of this privilege, as well as its limitations, proves that the oneness of the colonies deduced by Judge Story from the freedom of inhabitancy and inheritance grew only out of the common allegiance, which, when

¹ *Birtwhistle v. Vardill*, 7 Cl. & Fin. 825. pp. 57, 91, 98. Referred to *ante*, § 111.

² 7 Coke, 20b.

⁴ 10 Henning's Statutes at Large,

³ 1 Henning's Statutes at Large, pp. 129, 130.

broken in 1776, left the colonies and the people of each separate and distinct. And Virginia, in order to grant what without it they would not have possessed, extended the privilege of citizenship to those who were inhabitants of the other states of the Confederacy, excepting those who would have been detrimental to her society. And this point made by Judge Story loses all of its significance when, under the Confederation and the present Constitution of the United States, the privilege and immunity of citizenship is secured to the citizens of other States in each of them by an express contractual provision.¹

§ 121. The whole difficulty lies in the meaning to be attached to the equivocal phrase "one people," as used by Judge Story. If he means one people in the sense that all were Britons,—that all were under one king and dependencies of one kingdom,—there is no controversy. But the question we are discussing is, what political relation did the colonies hold to each other? and not were they dependencies of a common mother kingdom, but were they *one civil Body-politic*.

It is conceded by Judge Story that neither had any authority over or within another,—that neither was a part of the mother country, but a dependency, and that neither was any part of another. The non-alienage of the inhabitants of one in every other has been explained: the doctrine of inheritance has been shown to depend on different principles. Where, then, was there a shadow of political unity between the colonies? In fact, as each was sovereign (by Judge Story's concession), except for the supremacy of the Crown or Parliament of the mother country, the overthrow of that supremacy converted the conditional sovereignty of the colony into an absolute sovereignty. Previously conditioned upon its dependency, that condition was overthrown and the sovereignty became absolute when the dependency ceased. Independence of Great Britain determined the condition and

¹ Articles of Confederation, § 4; Const. U. S., art. 4, § 2.

left its sovereignty absolute. Each colony, by a separate ligament, was bound to Great Britain as a dependency. That distinct ligament being severed, each fell from the parental stem a separate commonwealth, independent of the mother country as of every other.

Acorns hanging from an English oak have many ties to the sturdy tree, but, falling to the earth, each is the germ and seed of a new and distinct life, each independent of its parent as of every other. There is a moral brotherhood and sympathy between children of a common mother, but each has his distinct faculties, his own will, his separate and independent life, free from the control or legal influence of his brethren.

While, therefore, conceding in full force the affinity and sympathies between the colonies, the philosophical historian must deny all political bonds between them, and maintain their absolute political independence as civil bodies-politic. The colonies, on becoming independent of Great Britain, became distinct and separate commonwealths, independent of the mother country and independent of each other. This point has been dwelt upon because the primordial unity between the colonies, being assumed or conceded, has led to radical errors in the subsequent history of the colonies merging into their independent condition as states.

II. THE CONTINENTAL CONGRESSIONAL ERA, FROM SEPTEMBER 5, 1774, TO MARCH 1, 1781.

§ 122. The assertion of power by the act of 6th George III., known as the "Grenville Act," claiming the power for Parliament to legislate for the colonies in all cases whatsoever, roused a state of feeling in America which was the presage to revolution.

The general apprehension gave rise to the organization in each colony of a committee of correspondence, through which communications were made between the colonies looking to a united defense of their liberties. But in 1774 the

passage of the "Boston Port Bill," and the falsely conciliatory project of Lord North, which struck off all the obnoxious duties except that of three pence a pound on tea, roused the people of Boston to the point of throwing overboard "240 chests of this abhorred and parliamentary poison into the sea."¹

The Assembly of Virginia was in session when the rough drafts of those obnoxious bills were communicated from Massachusetts. The Assembly entered at once an indignant protest against these acts. Whilst engaged in these defiant proceedings, Lord Dunmore, the Governor, dissolved them May 27, 1774. On the following day the members met by agreement at the long room in the Raleigh tavern, when, though divested of formal legal authority by the dissolution, yet as the true representatives of the people of Virginia, they entered into an agreement unanimously. They agreed that tea ought not to be used at all in the colony, nor any East Indian commodity, because the East India Company was leagued with the government against the liberties of the people.

They declared: "We are farther clearly of the opinion, that an attack made on one of our sister colonies, to compel submission to arbitrary taxes, is an attack made on all British America, and threatens ruin to the rights of all, unless the united wisdom of the whole be applied. And for this purpose it is recommended to the committee of correspondence, that they communicate with their several corresponding committees on the expediency of appointing deputies from the several colonies of British America, to meet in general congress, at such place annually as shall be thought most convenient; there to deliberate on those general measures which the united interests of America may from time to time require."²

¹3 Burk's History of Virginia, p. 380; 1 Pitkin's History pp. 467, p. 377.

468; American Archives, 4th series,

²3 Burk's History of Virginia, vol. I, p. 350.

This was followed by a recommendation that a convention meet at Williamsburg on the 1st day of August, to be composed of delegates from the different counties in the colony and dominion of Virginia. That convention met on the day named, and passed resolutions of the most determined character, and resolved that a general congress of deputies from all the colonies should assemble, and appointed to that general congress seven delegates, to wit: Peyton Randolph, Richard Henry Lee, George Washington, Patrick Henry, Richard Bland, Benjamin Harrison and Edmund Pendleton.

Rhode Island, on June 15, 1774, concurred in this recommendation of Virginia;¹ and Massachusetts, on June 17, 1774,² resolved that "a meeting of committees from the several colonies was proper to determine upon wise measures to be recommended to all the colonies." The action of the several colonies in response to this call by Virginia, as far as they led to the meeting of the congress of the colonies, may be seen in full in the Journals of that body.³ Georgia was not present in that congress.

§ 123. This First Continental Congress of twelve colonies met at Carpenter's Hall in Philadelphia on the 5th of September, 1774.

The questions which we propose to consider in respect to it are: What was its nature? Whom did it represent? From whom did it derive its power? For whom did it act? Let its own Journal and the official records decide.

Judge Story says:⁴ "Thus was organized, under the auspices and with the consent of the people, acting directly in their primary, sovereign capacity, and without the intervention of the functionaries to whom the ordinary powers of government were delegated in the colonies, the first general or national government, which has been very aptly called 'the revolutionary government,' since in its origin

¹ American Archives, 4th series, vol. I, pp. 416-17.

² Id., pp. 421-22.

³ 1 Journals of Congress, pp. 4-10, 13.

⁴ 1 Story's Comm., § 201.

and progress it was wholly conducted on revolutionary principles. The Congress, thus assembled, exercised *de facto* and *de jure* a sovereign authority; not as the delegated agents of the governments *de facto* of the colonies, but in virtue of original powers derived from the people. The revolutionary government thus formed terminated only when it was regularly superseded by the confederated government under the articles finally ratified, as we shall hereafter see, in 1781."

This statement of the learned author is neither correct nor accurate, and, as he deduces very extreme conclusions in support of his theory from this statement, it is important that the facts shall be succinctly stated. Whenever the organized legislature of a colony was permitted by its governor to remain in session, the deputies to this Congress were appointed under the authority of the popular branch of the colonial government, excluding the governor and council. Thus, the House of Representatives of Massachusetts in electing their representatives resolved that "a meeting of committees from the several colonies on this continent to consult upon . . . and to deliberate and determine upon wise and proper measures, to be by them recommended to all the colonies for the recovery and establishment of their just rights," etc. Therefore they elected five members as "a committee on the part of this province for the purposes aforesaid."

In Rhode Island, the general assembly of the colony appointed two delegates "to represent the people of this colony in General Congress of Representatives from this and the other colonies . . . to meet and join with the commissioners or delegates from the other colonies, in consulting upon proper measures to obtain a repeal of" certain obnoxious acts.

The Connecticut House of Representatives authorized the committee of correspondence to appoint deputies, and the House declared that "the persons thus to be chosen shall

be, and they are hereby directed, in behalf of this colony, to attend such Congress; to consult and advise on proper measures for advancing the best good of the colonies, and such conferences from time to time to report to this House." The committee of correspondence, pursuant to said authority, appointed the delegates from Connecticut.

In the case of New York they were appointed by popular vote in several of the towns and counties.

In New Jersey, "the committees appointed by the several counties of the colony of New Jersey to nominate deputies to represent the same in General Congress of deputies from the other colonies in America," convened and nominated, etc.

In Pennsylvania the House of the Assembly appointed seven persons as a committee "on the part of this province." The purpose declared was to consult upon the unhappy state of the colonies, to form a plan for obtaining redress and asserting American rights upon the most solid and constitutional principles, and for establishing union and harmony between Great Britain and the colonies.

The representatives of the people of Delaware, "taking into our most serious consideration the several acts of the British parliament," etc. In the absence of the legislative department, which could not be called together, they appointed deputies "in behalf of the people of this government to meet and act with those appointed by the other provinces in General Congress," to consult and advise with the deputies and to determine upon all such prudent and lawful measures.

In Maryland a meeting of the committees appointed by the several counties appointed "deputies for this province" "to effect one general plan of conduct . . . for the relief of Boston and preservation of American liberty."

In the province of New Hampshire, at a meeting of deputies appointed by the several towns in this province for the election of delegates on behalf of this province to join the General Congress proposed, there were present eighty-five

members. Two delegates were appointed on the part of this province to attend and assist, etc., to advise, consult and adopt such measures as to extricate the colonies from their present difficulties, etc.

In Virginia delegates were appointed by the convention of delegates from the counties of the colony to the General Congress of deputies from all the colonies to consider the most proper and effectual manner of so operating on the commercial connections of the colonies with the mother country as to procure redress for the much injured province of Massachusetts Bay, to save British America from the ravage and ruin of arbitrary taxes, and to restore harmony, etc.

The House of Assembly of South Carolina ratified and confirmed the appointment of deputies "on the part and behalf of this colony to meet the deputies of the other colonies, etc., in General Congress in reference to the grievances, etc., with full power and authority to concert and agree to such legal measures as in the opinion of said deputies and of the deputies so to be assembled, shall be most likely to obtain a repeal," etc.

North Carolina, at a general meeting of deputies of the inhabitants of this province, appointed deputies to take such measures as they may deem prudent, investing them with such powers "as may make any acts done by them, or consent given in behalf of this province, obligatory in honor upon every inhabitant hereof."

It will be perceived:

First. That in Massachusetts, Rhode Island, Connecticut, Pennsylvania and South Carolina, the deputies were appointed by authority of the colonial governments.

Second. In all the others, the governments had been dissolved by royal power, but in these the elections were made by meetings of the people in convention, and for and on behalf of their particular colony.

Judge Story obviously intends to intimate that the action of the people was in their primary and sovereign capacity. But what people? Is there anything in the action of any

one of the provinces which indicated that the people or the governments so acting in them were acting as parts of a larger civil Body-politic, of which each colony was a fractional part; and is not the evidence conclusive from these credentials that the electoral body of the deputies to Congress was acting only on behalf of the province or colony? The equivocal expression of the learned author, that the deputies acted upon original powers derived from the people, needs only to be restated to refute his conclusion. The election of the delegates from every province to the first Continental Congress was by the separate legislative body of the respective provinces, or by the people within that province, acting for and in behalf of that province, and that province alone.

Third. The opening of the Journal is conclusive upon this point. It reads: "A number of the delegates chosen and appointed by the *several* colonies and provinces in North America to meet and hold a Congress at Philadelphia assembled at Carpenter's Hall.

"Present:

"From New Hampshire,

— — —, — — —, etc.

"From Massachusetts Bay,

— — —, — — —," etc.

It is premature also to assert that the first Continental Congress was acting in any sovereign capacity. It acted simply as the deputies of a number of colonies who were seeking redress for grievances inflicted by the British government and for the restoration of the friendly relations between the colonies and the mother country. It was a body of consultation as to the best measures to be devised so to operate upon the British government as to induce a change of their policy, which was fatal to the liberties of the colonies as British dependencies.

In the credentials of each to the next Congress in May, 1775, it appears that wherever a regular government had been restored in any one of the colonies, the deputies were appointed by such government. Where they were not restored, they

were appointed by a convention of deputies appointed by the people of each province, and expressed the will of that province.¹ In this First Congress, as in all subsequent ones down to the adoption of the Constitution of 1789, each colony, or each state (when the colony became a state), had one vote given by its own deputies, and the action of the Congress was therefore the action of a majority of the colonies, and not of a majority of the deputies. It was therefore strictly a Congress of colonies.

§ 124. Judge Story further says: "The Congress of delegates (calling themselves, in their more formal acts, 'the delegates appointed by the *good people* of these colonies') assembled on the 4th of September, 1774," etc.² This statement is wholly incorrect, and the italics are the author's and are not to be found in the original document. The object of the author is apparent: that is, to represent the delegates in that Congress as calling themselves delegates appointed by "the good people" of these colonies as a unit, and not as delegates of the *several* peoples of the distinct colonies.

The question at issue, to which he attempts a solution favorable to his view, is that the colonies were one Body-politic, of which each colony was but a fraction, as against the view that each colony was a unit, and that it was a Congress of the colonial units, and not a Congress of the whole people embraced within their entire territory. Judge Story declares that the Congress of delegates called themselves, in their more formal acts, "the delegates of the good people of these colonies."

There are six formal addresses issued by this Congress. In but one of these is to be found the expression "the delegates of the good people of these colonies." That is to be found in the address "to the inhabitants of the colonies of New Hampshire, Massachusetts Bay," etc. (naming all but Georgia). It then proceeds: "Friends and countrymen, we, the delegates

¹ Journals of Congress, pp. 69-74. ² 1 Story's Comm., sec. 200.

appointed by the good people of these colonies to meet at Philadelphia in September last, for the purposes mentioned by our *respective* constituents, have," etc. Judge Story does not notice that the caption of this address is to the inhabitants of the colonies named separately, and that the words "we, the delegates appointed by the good people of these colonies," could only refer to the colonies who were named in the caption. So that it is a forced construction of this paper which would attribute to the deputies issuing it, a purpose to name themselves as delegates from one people, when they were addressing twelve colonies, from whom they had unquestionably derived their powers; especially when in the same sentence the purpose of their appointment is to be found in the delegation of authority from "our *respective* constituents."

Taking the whole paper together, therefore, so far from the use of these terms, "appointed by the good people," being construed as evidence of a "one people," from fractional portions of whom these deputies were elected, it would seem to be directly the other way. This is the only case out of the six in which this phrase is used, which by the learned commentator is said to be the mode in which the delegates called themselves in their more formal *acts*. They have only used it in one, and in the other five formal acts they have omitted it.¹

The great Declaration of Rights, October 14, 1774, opens thus:² "The good people of the *several* colonies of New Hampshire, Massachusetts Bay," etc. (naming all), "have *severally* elected deputies to meet," etc.

The association into which the members entered opens thus: "We, his majesty's most loyal subjects and delegates of the several colonies of New Hampshire, Massachusetts Bay," etc. (naming all), and it was signed by each of the deputies opposite to the name of his respective state.

The address to the people of Great Britain in its caption is from "the delegates appointed by the several English col-

¹ 1 Journals of Congress, p. 43.

² *Id.*, p. 27.

onies of New Hampshire, Massachusetts Bay," etc. (naming all).

The letter to the colony of St. John declares that "the status of America has been considered in a general Congress of deputies from the colonies of New Hampshire, Massachusetts Bay," etc. (naming all); and to the inhabitants of Quebec it is addressed by "the delegates of the colonies of New Hampshire, Massachusetts Bay," etc.*

The petition of Congress to his majesty is addressed by "your majesty's faithful subjects of the colonies of New Hampshire, Massachusetts Bay," etc. (naming all), "in behalf of ourselves and the inhabitants of these colonies, who have deputed us to represent them in general Congress," etc.

It is then obvious that the inference which Judge Story seeks to make from the use of the words "the good people of these colonies," in the more formal acts of the delegates, does not rest on any such authority, but only on one of six or seven distinct acts of that Congress, all the others of which are directly contrary to the inference drawn; and that in one case to which he has referred, the inference which he draws, if all the facts connected with it are taken into consideration, is distinctly negatived.

More stress is laid on this point than perhaps may be necessary, but the statement made by Judge Story as his conclusion from the formal addresses of the Congress seems to have misled the historian von Holst, who, without examining the original documents, has stated the conclusion of Judge Story as if it were a historic fact.

In no Congress from 1774 to 1781 is there a hint in the credentials of any delegate that he represented anything but his own colony, nor is there a symptom of any one ever claiming to represent the people of America, or any other people than the people of each separate colony.

Each colony spoke its own voice through its own deputies—an equal voice with each of the others despite their numerical strength; and Congress but spoke the combined

will of the colonies, for it was a Congress of colonies, and not of deputies from one people.

§ 125. Judge Story maintains that this Congress executed *de facto* and *de jure* the sovereign authority in virtue of original powers derived from the people.

Again we must call attention to the equivocal form of expression. No doubt it exercised powers derived from the people. But what people? From the whole of the colonies as one people,—as one civil Body-politic,—or from the people of each and every colony, and therefore derived from all? That is the political question which we are considering.

One extraordinary fact must be noted. During the seven years of the Continental Congressional Era Congress never passed a law. It passed resolutions and recommendations, but only two ordinances, and those merely as to its own internal operations — one to regulate the clothing department; the other, its treasury.

It is true that Congress performed many acts on which reliance is made to show the assertion of its sovereign power as the representative of the colonies as separate Bodies-politic, or of the colonies as constituting one sovereign Body-politic. They formed an association for non-intercourse, but did not enact it. They put the colonies in a state of defense. They raised troops; appointed a commander-in-chief and other general officers; emitted bills of credit, pledging the faith of the thirteen colonies to their redemption, and giving a quota of the payment of each bill to each colony; published a declaration of causes for taking up arms; organized a post-office department. It is asked, how did Congress acquire the power to do these things and many others? Without going too much into detail, a few conclusive observations will suffice.

§ 126. *First.* In the First Congress, which sat from September 5th to October 22d, it will be seen that there was no action taken by Congress which was otherwise than advisory. The association which was formed between the members might seem to be an exception to this, but a careful criticism

of that remarkable paper will show that "the delegates of the several colonies of New Hampshire, Massachusetts Bay," etc. (naming all), deputed to represent them in a continental Congress, after reciting the arbitrary acts of the British government, declares that, "to obtain redress of these grievances . . . we are of opinion that a non-importation, non-consumption and non-exportation agreement faithfully adhered to, will prove the most speedy, effectual and peaceful measure, and therefore we do, for ourselves and the inhabitants of the several colonies whom we represent, firmly agree, under the sacred ties of virtue, honor, and love of our country, as follows." Then follow a number of declarations of non-intercourse, and then the following conclusion: "And we do solemnly bind ourselves and our constituents under the ties aforesaid, to adhere to this association until" certain acts of Parliament be repealed; and then, "we recommend it to the provincial conventions and to the committees in the respective colonies, to establish such further regulations as they may think proper for carrying into execution this association."

It is thus clear, from the terms of the association, that it had no legal effect. It was an association of honor between the members of the Congress, binding their constituents "under the sacred ties of virtue, honor, and love of our country," and, far from assuming any paramount sovereignty in the matter, it "recommends to the provincial conventions and to the committees in the respective colonies to establish such further regulations for carrying this association into effect." This refraining from legislative enactment and this appeal to the local authorities of the colonies to execute their voluntary association is at once a denial of the legislative sovereignty of the Congress and a confession of the complete power of the local authorities.

The next meeting of the Congress was May 10, 1775, under a resolution passed by the First Congress, October 22, 1774. By that resolution Congress declared its opinion that another Congress should be held at Philadelphia, and "that

all the colonies in North America choose deputies as soon as possible to attend such Congress."

The Journal of the second session of Congress opens thus: "A number of delegates from the colonies of New Hampshire, Massachusetts Bay," down to South Carolina, "agreeable to their *appointment and orders* received from their *respective colonies*." This statement settles adversely the assumption of Judge Story that the members of Congress were not the delegated agents of the governments of the colonies, but represented the original powers of the people. This record states that they sat under the "appointment and orders received from their respective colonies." The authority given to the deputies to this Congress differs in terms from that given for the members of the prior Congress. A summary of each of these will be given in a note.¹

¹ First Journal of Congress, p. 69, etc.

New Hampshire: At the convention of deputies appointed by the several towns in the province aforesaid, etc., voted that John Sullivan and John Langdon "be delegated to represent this province in the continental congress," and "that they and each of them in the absence of the other, have full and ample power in behalf of this province to consent and agree to all measures which said congress shall deem necessary," etc. N. B.— Here is a delegation of power to represent this province, with full power in behalf of this province to consent and agree, etc.

Massachusetts: After reciting that the proceedings of the previous congress had been reported to the provincial congress of Massachusetts and were highly approved, the provincial congress then ap-

pointed five gentlemen, or any three of them, who "are hereby appointed and authorized to represent this colony" in the American congress, "with full power with the delegates from the other American colonies to consent, agree upon, direct and order every measure as shall to them appear to be best calculated," etc. N. B.— Clear appointment and authority to these parties to represent Massachusetts, and with full power to agree upon measures which shall appear best calculated, etc.

Connecticut: The house of representatives of the colony "proceeded to nominate, choose and appoint delegates," and made choice of five gentlemen "to be their delegates, any three of whom are authorized and empowered to attend said congress in behalf of this colony, to join, consult and advise with the delegates of the other colonies in

This summary establishes that in the second Congress the deputies were appointed by diverse methods, but in each case to represent the particular colony appointing the deputies, to act for and on its behalf, and agree to, on its behalf, all

British America on proper measures for advancing the best good of the colonies." N. B.—Clear delegation by the colony of full power to its delegates to act on its behalf.

New York: Provincial conventions held "for the purpose of appointing delegates to represent the colony of New York" unanimously elected certain gentlemen as "delegates to represent this colony at such congress, with full power to them, or any five of them, to meet the delegates from the other colonies, and to consent and determine upon such measures as shall be adjudged most effectual," etc. N. B.—Here is clear delegation to its own deputies to represent the colony of New York, and with full power to determine upon such measures as shall be adjudged effectual.

New Jersey: The assembly unanimously resolved that five gentlemen, "or any three of them, be and they are hereby appointed to attend the continental congress of the colonies" in May next, "and that they report their proceedings to the next session of the general assembly." N. B.—Here there is no power given, but there is an indication that the proceedings of the congress were to be reported back to the general assembly of New Jersey for assent or dissent.

Pennsylvania: The assembly resolved that nine gentlemen "be and they are hereby appointed deputies on the part of this province"

to attend the general congress, "unless the present grievances of the American colonies shall, before that time, be redressed." N. B.—Here there is clear delegation of power to the deputies to act on the part of Pennsylvania, but there is no statement as to power, it seeming to be supposed that there might be no necessity for the meeting.

Delaware: The assembly named three gentlemen "who are hereby appointed and authorized to represent this government at the American congress" . . . with full power to them, or any two of them, together with the delegates from the other colonies, to concert and agree upon such further measures as shall appear best calculated . . . and that they report their proceeding to the next session of the general assembly. N. B.—Clear authority to represent Delaware, with full power to agree upon any measures, but with the requirement to report back their proceedings to the general assembly.

Maryland: Deputies appointed by the several colonies of the counties of Maryland resolved that seven gentlemen, "or any three or more of them, be delegates to represent this province in the next continental congress, and that they, or any three or more of them, have full and ample power to consent and agree to all measures that such congress shall deem necessary." N. B.—Clear delegation to represent

measures which might be concerted between its own deputies and the deputies of the other colonies in Congress, and that there was unlimited power given by each province to its deputies to bind that province, except in one or two cases where it appears that the authorities of the province appointing the deputies required a report of the proceedings back to that province.

One thing is settled beyond question: that the dogmatic statement of Judge Story, that "the Congress thus assembled exercised *de facto* and *de jure* a sovereign authority; not as the delegated agents of the governments *de facto* of the colonies, but in virtue of original power derived from the people," is wholly unsustained, and is completely refuted by the facts.

Maryland, with full and ample power to consent, etc.

Virginia: A convention of delegates from the counties and corporations in the colony of Virginia proceeded "to the election of delegates by ballot to represent this colony in general congress," and seven gentlemen were chosen for that purpose. N. B.—Clear statement that the delegates were the representatives of Virginia, with no limitation on their powers.

North Carolina: At a general meeting of the delegates of the inhabitants of this province in convention, three gentlemen were "appointed delegates to attend the general congress . . . and they are hereby invested with such powers as may make any acts done by them, or any of them, or consent given in behalf of this province, obligatory in honor upon every inhabitant thereof." And in the assembly of North Carolina a resolution was passed approving of the proceedings of the first congress, and binding themselves to adhere

to the resolutions of that congress.

N. B.—Here there is clear delegation to its deputies to act in behalf of North Carolina, and make the acts so done by them obligatory upon the people of North Carolina, and sanction is given to what had been done in the first congress.

South Carolina: In the commons house of assembly satisfaction was expressed with the action of their delegates in the first congress, and they named and appointed the same five gentlemen "deputies for and in behalf of this colony, to meet," etc. . . . "with full power and authority to concert, agree to, and effectually prosecute such measures as in the opinion of the said deputies shall be most likely," etc. N. B.—This action by the commons house of assembly was confirmed by the provincial congress of South Carolina, who appointed the same gentlemen to represent that colony, with full power to concert, agree upon, etc.

Rhode Island and Georgia do not appear.

Second. A very striking fact, confirmatory of these views, is found in the case of Georgia, in which it was conclusively shown that no one was admitted to full participation in the proceedings of the Congress unless he was a delegate of a colony.¹ This seems to settle the point that, for all official action of Congress, it was a Congress of colonies, and not of deputies of the people without reference to their colonial relation.

Subsequently, September 13th, the province of Georgia appointed several gentlemen "to take their seats as representatives of the province of Georgia, to do, transact, join and concur with the several delegates from the other colonies and provinces in all matters and things that shall appear eligible and fit," and pledging that "Georgia will abide by and carry into execution whatsoever our said delegates, or any three of them, shall determine and resolve upon."

Third. No action of importance was taken by Congress at any time which was not dependent in a large degree for its real effect upon the will of the separate colonies.

Fourth. In many if not in most cases, the separate colonies, by subsequent action, approved and ratified what Congress had previously done, or so acquiesced in it that a remarkable letter was written by Congress in 1779, justifying much of its action upon that ground, and on the separate sanction given by each colony to the terms of the Declaration of Independence after it was adopted, which formally gave to Congress the use of the needful means of war, treaty-making, etc., to sustain the independence so declared.²

¹ A delegate from the parish of St. John's, Georgia, presented his credentials, when it was "agreed unanimously that he be admitted as a delegate from the parish of St. John's, in the colony of Georgia, subject to such regulations as the congress shall determine relative to his voting." 1 Journals of Congress, p. 91. Subsequently the question arose whether he could be admitted to vote. He admitted that he did not represent a colony, but only a part, and therefore did not insist on giving a vote as a colony, but was content to hear and assist in the debates and to give his vote in all cases, except when the sentiment of congress was taken by colonies.

² 5 Journals of Congress, pp. 259, 267.

Fifth. Up to the Declaration of Independence, July 4, 1776, the action of Congress could not have been otherwise than as the representatives of the colonies, for they were seeking only, as was amply declared in all their proceedings, to restore the relations of the colonies as they had previously existed to the crown of England. To suppose, therefore, that the action of the colonies, or of the people of the country in forming a Congress, was to constitute a new colonial political existence, in which the thirteen colonies were merged in one, would be totally at war with the purposes of the whole movement. The colonies, therefore, as dependencies of the crown, and they alone, could act in this movement for the restoration of friendly relations between the crown and the colonies. In the declaration for the causes and necessity for taking up arms, they expressly declare, "Lest this declaration should disquiet the minds of our friends and fellow-subjects in any part of the Empire, we assure them, that we mean not to dissolve that union which has so long and so happily subsisted between us, and which we sincerely wish to see restored . . . we have not raised arms with ambitious designs of separating from Great Britain and establishing independent states."

When it was finally determined to enter upon a war for the defense of colonial rights, George Washington, on the 15th of June, 1775, was unanimously elected General to command all the forces raised or to be raised for the defense of American liberty, with the pay of \$500 per month.¹ His memorable reply, in which he assumed the trust but declined the pay, only asking to keep an exact account of his expenses, which was all he desired to be paid, will be found in the proceedings of Congress. The commission to him is from the delegates of the united colonies of New Hampshire, Massachusetts Bay, etc., down to South Carolina.

The oath of office was prescribed in this form: "I do acknowledge the thirteen united states of America, namely, New Hampshire, Massachusetts Bay," etc., down to Georgia,

¹ 1 Journals of Congress, pp. 111, 112.

"to be free, independent and sovereign states, and declare that the people thereof owe no allegiance or obedience to George III., King of Great Britain . . . and I do swear that I will, to the utmost of my power, support, maintain and defend the said United States against the said George III.," etc.¹

Sixth. Congress, in making rules and orders for the navy of the united colonies, declared: "The commanders of all ships and vessels belonging to the thirteen united colonies," etc., indicating the joint right of property by the thirteen colonies.

§ 127. Again, upon the emission of bills of credit, it was resolved "that the thirteen united colonies be pledged for the redemption of the bills of credit so directed to be emitted; that each colony provide ways and means to sink its proportion of said bills," etc.; showing that the thirteen colonies, as such, were responsible for the bills, and that each assumed its proportion and quota of such bills and levied taxes for the purpose of raising the same. Congress had no power of taxation and, therefore, did not pledge itself, but pledged its constituents, the thirteen colonies, as its principals.

Again, Congress, on the 24th of June, 1776, resolved: "That all persons abiding within any of the united colonies and deriving protection from the laws of the same, owed allegiance to the said laws and are members of such colonies, and that all persons passing through," etc., owed allegiance thereto; "that all persons members of, or owing allegiance to any of the united colonies, as before described, who shall levy war against any of the aforesaid colonies within the same . . . are guilty of treason against such colony."

"That it be recommended to the legislatures of the several united colonies to pass laws for punishing in such manner as to them shall seem fit, such persons afore described as shall be proved attainted of such deed of treason before described."

¹ 2 Journals of Congress, p. 400.

These resolutions of Congress define treason as a crime against each colony, but affirm no such crime against the united colonies; and, furthermore, hold no inherent power in Congress to punish any such act of treason, and apply to each colony as the only power that can do so.¹

Congress further resolved "that it be recommended to the several legislatures of the united colonies, to pass laws for punishing persons who shall counterfeit, or aid or abet in counterfeiting the continental bills of credit," etc.; thus indicating the absence of power in Congress to punish the counterfeiting of bills of credit issued by its own orders, and appealing to the supreme power of each colony to do what it avowed it could not do itself.² It also asked each colony to punish the destruction of continental magazines.³ On the 5th of July, after the Declaration of Independence had been adopted, it resolved "that it be recommended to the assemblies, conventions, or councils of safety of Virginia, North and South Carolina to permit the raising troops within their respective states," etc.; thus disclaiming the power itself to raise troops in these colonies without the permission of each colony by its own authority.⁴

On the 27th of December, 1776, Congress vested in General Washington very great powers, authorizing him to raise troops, "to arrest and confine persons who refuse to take the continental currency, or are otherwise disaffected to the American cause, and return to the states of which they are citizens, their names and the natures of their offenses, together with the witnesses to prove them." By which it was indicated that, while General Washington should have the power to arrest, the power to try and punish was vested only in the state of which the person accused was a citizen. The Congress, while exercising this power to enlarge that of General Washington, prepared a circular letter to the several united states to explain the reasons for doing so, and requesting the states to co-operate with him and give

¹ 2 Journals of Congress, p. 217.

³ 3 Id., p. 330.

² Id., p. 218.

⁴ 2 Id., p. 236.

him all the aid in their power. This procedure was obviously taken by Congress in the hope that none of the colonies would condemn the action of Congress in so doing, and such a hope is entirely at variance with the idea of self-assertion of sovereign power.

Seventh. The resolution of October 14, 1774, in which Congress asserted so clearly and distinctly the original authority of each colony as a distinct Body-politic, is utterly at variance with the theory of Judge Story and others, that congress assumed a sovereignty, *de facto* or *de jure*, for itself, and did not depend entirely upon the authority which in these resolutions they clearly asserted for each colony.

Eighth. Much stress has been laid upon the fact that several of the colonies formed governments upon the suggestion of Congress. To understand this action, it must be remembered that Congress was made the organ of all the colonies for consultation and for arriving at a common decision upon the action of each and all in achieving a common safety from a common danger. It was natural, therefore, that no colony would undertake a new step in advance of its sister colonies, without regard to the opinion of the other colonies with whom it was in consultation.

Hence, in the case of Massachusetts, where the original colonial government had been overthrown, its provincial convention addressed a letter, May 16, 1775, to Congress, stating the difficulties they labored under for want of a regular form of government, "and requesting Congress to favor them with explicit advice respecting the taking up and exercising the powers of civil government, and declaring their readiness to submit to such a general plan as the Congress may direct for the colonies," etc.¹

Congress came to the following resolution: . . . "in order to conform as near as may be to the spirit and substance of the charter, it be *recommended* to the provincial convention, to write letters to the inhabitants of the several places which are entitled to representation in assembly, re-

¹ 1 Journals of Congress, p. 105.

requesting them to choose such representatives, and that the assembly when chosen do elect councillors; and that such assembly or council exercise the powers of government until a governor of his majesty's appointment will consent to govern the colony according to its charter." It is obvious that this was a request for advice by Massachusetts, and that the advice was not mandatory, but merely recommendatory.¹

New Hampshire, through its delegates in Congress, asked of Congress advice and direction in the same matter,² and Congress, on the 3d of November, 1775, resolved "that it be *recommended* to the provincial convention of New Hampshire to call a full and free representation of the people."³

A like recommendation was made to South Carolina.⁴ Many of the states, without respect to any advice from Congress, took action in this matter of establishing a government for the states.

North Carolina, in April, 1776, took such steps, and its government went into effect December, 1776.

Connecticut, early in 1776, declared its form of government, and that it was a free, sovereign and independent State; and so Rhode Island, in May, 1776, and New Jersey in July, 1776. And in April, 1776, Massachusetts changed the style of judicial writs, which had issued in the name of George III., to the name "the people and government of Massachusetts."

§ 128. In the State of Virginia the case was peculiar. Lord Dunmore assembled the regular general assembly in March, 1775, which, after several adjournments, on the 6th day of May, 1776, in Williamsburg, met and declared that it was their "opinion that the people could not now be legally represented according to the ancient constitution, which had been subverted by the king, lords and commons of Great Britain, and consequently dissolved, they unanimously dissolved themselves accordingly." Its members then assem-

¹ Journals of Congress, p. 108.

³ Id., p. 215.

² Id., p. 206.

⁴ Id., p. 219.

bled as a convention of the people. Judge St. George Tucker says: "It was a great body of people assembled in the persons of their deputies to consult for the common good, and to act in all things for the safety of the people."¹ It assembled in May, 1776. On the 15th day of May this convention made a solemn declaration,² and came to several

¹ 1 Tucker's Blackstone, Appen., p. 68.

² "For as much as all the endeavors of the united colonies, by the most decent representations and petitions to the king and parliament of Great Britain to restore peace and security to America under the British government and a re-union with that people upon just and liberal terms, instead of a redress of grievances, have produced, from an imperious and vindictive administration, increased insult, oppression, and a vigorous attempt to effect our total destruction. By a late act of parliament all the colonies are declared to be in rebellion, and *out of the protection of the British crown*, our properties are subjected to confiscation, our people when captivated, compelled to join in the murder and plunder of their relations, and countrymen, and all former rapines and oppression of Americans declared legal and just; fleets and armies are raised, and the aid of foreign troops engaged to assist their destructive purposes. The king's representative in this colony, hath not only withheld the powers of government from operating for our safety, but having retired on board an armed ship, is carrying on a piratical and savage war against us,

tempting our slaves by every artifice to resort to him, and training and employing them against their masters. In this state of extreme danger we have no alternative left but abject submission to the will of those overbearing tyrants, or a *total separation*, from the crown and government of Great Britain, uniting and exerting the strength of all America for defence and *forming alliances with foreign powers for commerce and aid in war*. Wherefore, appealing to the Searcher of Hearts for the sincerity of former declarations, expressing our desire to preserve the connection with that nation, and that we are driven from that inclination by their wicked councils and the eternal laws of self-preservation;

"Resolved unanimously; that the delegates appointed to represent this colony in general congress, be instructed to propose to that respectable body to declare the united colonies, free and independent states, absolved from all allegiance to, or dependence upon the crown or parliament of Great Britain: and that they give the assent of this colony to such declaration and to whatever measures may be thought proper and necessary by congress, for forming foreign alliance, and a *confederacy* of the colonies at such

resolutions thereupon. This extraordinary and first Declaration of Independence, in which the State of Virginia declared that there was "no alternative left but abject submission to the will of those overbearing tyrants, or a *total separation* from the crown and government of Great Britain," declared for the "*total separation*," and instructed their delegates to make such a declaration as to all the States, and to "give the assent of this colony to such declaration, and to whatever measures may be thought proper and necessary by Congress for forming foreign alliance, and a *confederacy* of the colonies," with the proviso, "that the power of forming governments for, and the regulations of the internal concerns of each colony, be left to the respective colonial legislatures." And by the last resolution steps were taken to frame a "declaration of rights, and such a plan of government" for the colony.

Virginia's Bill of Rights was adopted June 12, 1776, and her Constitution on the 29th of June, 1776, five days before the Declaration of Independence. In the preamble to this Constitution, drawn by Mr. Jefferson, substantially the same grounds for independence are stated as in the general Declaration of Independence. In both of these important papers she assumed all power of government, her succession to the crown, rights of escheat, settled the territorial questions between herself and neighboring states, elected her governor and other officers, who, on the 5th of July, 1776 (when the general Declaration could not have been heard of), took the oath of official fidelity to the Commonwealth of Virginia. All writs were to issue in the name, and indictments to conclude against the peace and dignity, of the Commonwealth

time and in such manner, as to them shall seem best; provided that the power of forming governments for, and the regulations of the internal concerns of each colony, be left to the respective colonial legislatures.

"Resolved unanimously, that a

committee be appointed to prepare a declaration of rights, and such a plan of government as will be most likely to maintain peace and order in this colony, and secure substantial and equal liberty to the people." Tucker's Blackstone, vol. I, Appen., pp. 89, 90.

of Virginia. In the same year she passed an act prescribing an oath of allegiance to the Commonwealth of Virginia as a free and independent state.¹ It so happened that on the 10th and 15th of May, 1776, Congress passed a preamble and resolution *recommending* to all the colonies to form governments, but it never claimed power to direct it, or to control it, or supervise the action taken by any colony.²

This review of the public acts of Congress and the states during this continental era proves the recognition by Congress of all real power of government in each of the colonies; its own conscious inability to carry out its will, and its dependency on the separate sovereignty of the states. It could not punish the forgery of its own bills, nor the destruction of its own magazines; nor did it claim that treason was possible against itself, or against any government save that of the several colonies. In fact, in its famous declaration of October 14, 1774, it had claimed no power, but had only declared the supreme and exclusive authority of each colony. The autonomy of each colony or state to regulate exclusively its own internal government was asserted by each colony and never questioned by Congress, and the whole action of Congress, which is claimed to have been upon the self-assertion of sovereignty, *de facto* and *de jure*, is shown by all the facts of history to have been based upon powers vested by each separate colony in its deputies to confer with the deputies from other colonies, and agree upon concerted action for the benefit of all, with the concurrence of all thus given.

One further remark may here be made. In the resolutions of October 14, 1774, the only power that was asserted for Parliament was the power of regulating commerce between the colonies on the one hand and the mother country and the world on the other. Upon the Declaration of Independence this power, which had not belonged to the

¹9 Henning's Statutes at Large,
p. 119.

²2 Journals of Congress, pp. 158,
166.

powers of the separate colonies, might have been supposed to have devolved upon the united colonies or states, but no such claim was ever made by Congress or conceded by the colonies. Even this imperial power over commerce devolved, upon the severance of the bond between the mother country and the colonies, upon each colony as a part of its own sovereignty. But Judge Story, as the leader of the school of political writers whose views we are considering, has declared that the Declaration of Independence was "an act of paramount and sovereign authority;" was the "act of the whole people of original inherent sovereignty by the people themselves . . . by the good people of these colonies."¹

§ 129. Let us consider this proposition. If Judge Story meant by this all the people of the United States, because the people of every state united in it, we should not deny but affirm the statement; but if he meant that it was the act of one Body-politic, of which the colonies were but fractional parts and not the multiple of thirteen colonies, of which each colony was a distinct unit, the theory is false and wholly unsupported by any historic facts, but is contradicted by all. A most interesting account of the debates leading to the Declaration of Independence was given by Mr. Jefferson to Mr. Madison, and published by the latter. They are in Mr. Jefferson's own handwriting, and will be found in "The Madison Papers," vol. I, page 9 *et seq.*

On the 7th of June, 1776, Richard Henry Lee, one of the delegates from Virginia, in obedience to her instructions and on behalf of the delegates from Virginia, moved: "That the Congress should declare that these United Colonies are, and of right ought to be, free and independent States; that they are absolved from all obedience to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved; that measures should be immediately taken for procuring the

¹ Story on the Constitution, sec. 211.

assistance of foreign powers, and a Confederation be formed to bind the Colonies more closely together.”¹ The resolutions of instruction have already been given.² The substance of the debates is given by Mr. Jefferson and also by Pitkin.³ Mr. Jefferson says it was argued by those opposed to the measure:

“That the people of the middle colonies, Maryland, Delaware, Pennsylvania, the Jerseys and New York, were not yet ripe for bidding adieu to British connection, but that they were fast ripening and in a short time would join in the general voice of America: . . . that some of them had expressly forbidden their delegates to consent to such a declaration, and others had given no instructions and consequently no power to give such consent: that if the delegates of any particular colony had no power to declare such colony independent, certain they were, the others could not declare it for them, the colonies being as yet perfectly independent of each other: . . . that it was probable that the Pennsylvania convention, the convention of New York and those of the Jerseys and Delaware, would take up the question of independence and would declare to their Delegates the voice of their state: that if such a declaration should now be agreed to, these delegates must retire, and possibly their colonies might secede from the Union: that such a secession would weaken us more than could be compensated by any foreign alliance. . . . On the other side, it was urged by J. Adams, Lee, Wythe and others, that no gentleman had argued against the policy, or the right of separation from Britain, . . . that they had only opposed its being now declared: that the question was not whether by a Declaration of Independence we should make ourselves *what we are not*, but whether we should declare a *fact which already exists*: that as to the people, or parliament of England, we had always been independent of them, their restraint on our trade deriving efficacy from our acquiescence

¹ Madison Papers, vol. 1, p. 9.

³ 1 Pitkin's History, p. 362, etc.

² *Ante*, § 24, note.

only, and not from any rights they possessed of imposing them, and that so far our connection had been federal only, and was now dissolved by the commencement of hostilities: that as to the king, we had been bound to him by allegiance, but that this bond was now dissolved by his assent to the late act of parliament, by which he declares us out of his protection, and by his levying war on us, a fact which had long ago proved us out of his protection; it being a certain position in law that allegiance and protection are reciprocal, the one ceasing when the other is withdrawn: . . . that the delegates from the Delaware counties, having declared their constituents ready to join, there are only two colonies, Maryland and Pennsylvania, whose Delegates are absolutely tied up, and that these had, by their instructions, only reserved a right of confirming or rejecting the measure.”¹ . . . Mr. Jefferson proceeds to state, that “it appearing from the course of these debates, that the colonies of New York, New Jersey, Pennsylvania, Delaware and Maryland were not matured for falling from the parent stem, but that they were fast advancing to that state, it was thought most prudent to wait a while for them, and to postpone the final decision to the 1st of July.”²

In the meantime a committee was appointed to prepare a declaration. Committees were also appointed to prepare a plan of confederation for the colonies, and to state the terms proper to be proposed for foreign alliance. The Declaration of Independence drawn by Jefferson was reported to the House June 28th, and on the 1st of July the House went into committee of the whole and resumed consideration of the original motion made by the delegates from Virginia, which on the next day was carried in the affirmative by the votes of nine states.

South Carolina and Pennsylvania voted against it. Delaware, with but two members present, was divided. The delegates from New York declared themselves for it, but

¹ 1 Madison Papers, 10-13.

² Id. 16.

were not justified in voting upon either side until they heard from their convention. South Carolina changed its vote and then concurred in voting for it. Three members from Delaware arrived and turned the vote of that colony in favor of the resolution. Members of different sentiments from Pennsylvania changed its vote. "So that the whole twelve colonies, who were authorized to vote at all, gave their votes for it." Within a few days the convention of New York approved of it, and her delegates cast their vote for it. The debate on the Declaration closed on the evening of the 4th of July, when it was reported by the committee, agreed to by the House, and signed by every member except Mr. Dickinson. Mr. Pitkin gives the action of the different colonies on this point.¹

§ 130. North Carolina on the 22d of April empowered her delegates in Congress to declare for independence. So the general assembly of Massachusetts on the 23d of May. So also the assembly of Rhode Island in May directed that the oath of allegiance to the colony be taken, and instructed their delegates in Congress to join with the other colonies for promoting the confederation between the colonies, making treaties with foreign powers, taking care to secure to Rhode Island all powers of government relating to its internal police, and conduct of affairs, civil and religious. New Hampshire, on the 15th of June, and Connecticut on the 14th of June, and New Jersey on the 21st of June, instructed their delegates in Congress to assent to a declaration of independence. Pennsylvania, in June, authorized its delegates to form "such federal compacts between the united colonies and treaties with foreign powers as shall be necessary, reserving to the people of this colony the sole and exclusive right of regulating the internal government and police of the same." They afterwards, on the 24th of June, agreed to a declaration that the united colonies were free and independent states. And the convention of New York on the

¹ 1 Pitkin, pp. 362-65; 12 Niles Register, p. 305.

9th of July sanctioned the Declaration of Independence, and instructed their delegates to co-operate in its passage.¹

It thus appears that the Declaration of Independence was a declaration made by the colonies, not as one people, but by the several colonies as distinct peoples, through their delegates in Congress, under the instructions of the conventions or assemblies of the several colonies.

It was considered by Congress on all hands that a majority vote in Congress could not bind a colony that did not separately consent to it; that to attempt such a thing would have resulted in the secession of such colonies from the union; that it was therefore the united declaration of thirteen distinct colonies, and not the declaration of one people by a majority vote, controlling every colony despite its dissent. It gained its authority from each separate colony authorizing its delegates to assent thereto. The whole proceeding excluded the idea of any paramount sovereignty of Congress as the potential representative of one civil Body-politic, divided into thirteen subordinate provinces. The terms of the Declaration confirm this view. They are as follows: "We, therefore, the representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS assembled, . . . do, in the name and by authority of the good people of these colonies, solemnly publish and declare that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as FREE AND INDEPENDENT STATES, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which INDEPENDENT STATES may of right do."

It will be perceived that this is a declaration that the united colonies *are*,—not shall be, but *are*,—free and independent states,—not a free and independent state, but the multiple of thirteen units; and this is made more palpable

¹ 2 Journals of Congress, p. 250.

by the statement that all connection between *them* and the *state of Great Britain* is totally dissolved. In other words, they declared, as the advocates of the Declaration said in debate, "a fact which already existed,—an independence of Great Britain by each and all the colonies prior to the general Declaration." This Declaration therefore proved that the independence of each state preceded the Declaration and was not consequent upon it. The facts already stated in reference to the action of the states prior to the final adoption of the Declaration are conclusive upon this point. Virginia, indeed, had adopted its Constitution and established its permanent government five days before the Declaration was made.

That this Declaration was the combined Declaration of the *several* colonies is proved by an important letter addressed to their constituents by the Congress of the United States on the 13th of September, 1779,¹ in which the congress vindicated all of its action by claiming that all of the acts of Congress had been ratified and sanctioned by the several colonies by laws passed by their respective legislatures. Congress also claimed that the credentials of the different delegates who composed the Congress in 1774–76 had given power to Congress to do the things which it did, for obtaining a redress of grievances, and that on the 4th of July, 1776, "your representatives in Congress did, in the name of the people of the thirteen united colonies, declare them to be free and independent states. . . ." Was ever confederation more formal, more solemn or more explicit? It has been expressly consented to and ratified by every state in the Union.²

¹ 5 Journals of Congress, 259–267. vol. 3, p. 89; Connecticut, Id., p. 447;

² That this was done will appear in reference to every state but Georgia, in the American Archives. As to New York, Series 5, vol. 1, p. 1391; New Jersey, Series 5, vol. 1, p. 369; Pennsylvania, Series 5, vol. 2, p. 10; Maryland, Series 5, South Carolina, Id., p. 7; Rhode Island, Series 5, vol. 1, p. 475; Delaware, Id., p. 617; Massachusetts, Id., p. 1225; North Carolina, Id., p. 1365; Virginia, Id., p. 464; New Hampshire, Id., p. 428.

These statements by the Congress are emphatic denials of any original power in Congress, and a clear affirmation that all power exercised by it, including the Declaration of Independence, was by the express assent, sanction and ratification of every state in the Union. In truth, so far from claiming original sovereignty in itself, it maintains that its powers were derived from an actual confederation between the states, solemnly and explicitly assented to by each and every state. When, therefore, Judge Story relies upon the phrase in the Declaration, "that the representatives in the name and by authority of the good people of these colonies," as indicating one sovereignty, *de facto* and *de jure*, it is a claim which is condemned by all the facts in the case.

If there was one sovereignty existent in Congress, *de facto* and *de jure*, why did it delay its Declaration until the fractions could be heard from? Why did not the passage of the Declaration by the will of the majority bind the minority even against their consent? The fact that on all hands it was admitted this could not be done is a conclusive negation of the hypothesis of the learned commentator. And why should the *one people* declare the freedom and independence of many states? If the united colonies were one free and independent state, of which the colonies were but fractions, why did the Declaration affirm that "the thirteen colonies are, and of right ought to be, free and independent states?"

§ 131. The point has sometimes been made that the Declaration of Independence is entitled: "A Declaration by the Representatives of the United States of America in Congress Assembled," and it is sought to show thereby that it is a Declaration of the representatives of the United States, excluding the idea of its being a Declaration by the separate States. It is interesting to see that this form was the one adopted in the draft by Mr. Jefferson, and it is inserted in the open Journal and is thus signed: "Signed by order and

in behalf of the Congress, John Hancock, President." The paper signed was engrossed by order of Congress.

On the "Secret Journal of Congress, Domestic Affairs," the following resolution was passed, July 19, 1776:

"*Resolved*, That the Declaration passed on the 4th be fairly engrossed on parchment, with the title and style of 'The Unanimous Declaration of the Thirteen United States of America,' and that the same, when engrossed, be signed by every member of Congress." On August 2, 1776, "The Declaration of Independence being engrossed and compared at the table, was signed by the members."

The engrossed copy is on parchment and its heading follows the language of the "Secret Journal:" "In Congress, July 4th, 1776. The Unanimous Declaration of the Thirteen United States of America."¹ This shows that the Congress deemed it wise to change the terms of the heading upon the original Declaration to that in which it would appear to be the unanimous declaration of the Thirteen States.

In the great case of *Ware v. Hylton*,² Judge Chase says: "On the 4th of July, 1776, the United States in Congress assembled declared the thirteen united colonies free and independent States; and that as such they had full power to levy war, conclude peace, etc. . . . I consider this as a declaration, not that the united colonies jointly, in a collective capacity, were independent States, etc., but that each of them was a sovereign and independent State, that is, each of them had a right to govern itself by its own authority and its own laws, without any control from any other power upon earth."³

In the case of *Penhallow v. Doane's Administrators*,⁴ Judge Patterson said: "Before the articles of confederation were ratified, or even formed, a league of some kind subsisted among the States. . . . The States, when in Congress,

¹ Secret Journals of Congress, 48, 49.

² Id. 168.

⁴ Id. 84-127.

³ 3 Dall. 164-229.

stood on the floor of equality; and until otherwise stipulated, the majority of *them* must control.”¹

In the case above referred to, Judge Iredell said: “Under the British government, and before the opposition to the measures of the parliament of Great Britain became necessary, each province in America composed, as I conceive, a Body-politic, and the several provinces were no otherwise connected with each other than as being subject to the same common sovereign. Each province had a distinct legislature, a distinct executive subordinate to the king, a distinct judiciary, and in particular the claim as to taxation, which began the contest, extended to a separate claim of each province to raise taxes within itself; no power then existed or was claimed for any joint authority on behalf of all the provinces to tax the whole.”²

All judges in that case agreed that the powers of Congress were “derived from the people of each province,” — conveyed by each Body-politic separately, and not by all jointly, and that Congress had no power not given; that the powers were given by the credentials to the delegates, or by subsequent ratification, and that the States were sovereign, saving only the powers they had delegated to Congress.

§ 132. But the theory of the learned commentator runs counter to another fact in the history of this era.

In the summer of 1775, Dr. Franklin submitted to Congress articles of confederation and perpetual union among the colonies, which were never finally acted upon. It declared that the colonies enter into a firm league of friendship with each other; that each colony was to retain its own laws, etc.; that Congress was to have the power of determining on war, peace, alliances, etc.; that the common treasury was to be supplied by each colony, and the taxes to be laid and levied by each colony. The confederation to be approved by the several provincial conventions or assemblies, and to continue until reconciliation with the mother country be agreed to. If such reconciliation were restored, the colonies

¹ 3 Dall. 88.

² Id. 97.

were to return to their former connection with Great Britain, but on failure thereof, the confederation was to be perpetual.¹

As we have seen, Virginia, New Jersey, Maryland, New York and others instructed their delegates to give their assent to a confederacy of the colonies;² many of them qualifying their assent by reserving internal regulation to their respective legislatures. Congress, as we have seen, entered on this plan, suggested by the Virginia delegates, June 11, 1776, and, after debating it with great fullness, matured it finally November 15, 1777, and submitted it to the legislatures of the respective States for their ratification, declaring in its terms that until ratified by each and all it was binding on none.

If the colonies on the 4th of July, 1776, were, as claimed by Judge Story, a paramount sovereignty,—a sovereignty *de facto* and *de jure*,—a one people,—supreme over all the colonies, where was the necessity of forming a confederacy? Who ever heard of a sovereignty forming a confederation between the territorial fractions of which it was composed? And if sovereign, why abdicate its paramount sovereignty for the imbecility of a federal government? And if the united colonies constituted a sovereignty, what right had a State to reserve internal government for itself from the hands of its absolute sovereign? And yet Congress, by the hypothesis of Judge Story, clothed with absolute and paramount authority, was urging the adoption of this feeble confederation upon the provincial fractions into which it was subdivided to supersede its sovereignty.

Confessedly without power to tax, Congress was utterly at the will of the States,—a sovereign at the feet of its subordinate provinces! Every historian of the period described the confederation subsequently formed as so helpless and feeble that, but for the French alliance, we should have lost our independence; and yet this confederation was the *de-*

¹ 2 Pitkin, pp. 9-11.

² 2 Journals of Congress, pp. 224-226, 250, 435, 454.

sideratum which Congress was urging upon the States to supersede its pre-existent authority, which Judge Story claims was supreme; and surely no one has stated more powerfully the imbecility of the subsequent confederation than Judge Story himself.¹ The historic facts which we have heretofore presented prove the impotence of the confederation between the colonies prior to the adoption of the Articles of Confederation. The hypothesis of Judge Story, however, attributes to it omnipotence; leading to this extraordinary result if admitted: asserted omnipotence deliberately seeking a paralysis of its powers and producing a condition of administrative weakness in order to achieve an independence which was the desire of every patriotic heart!

In *Martin v. Waddell*,² Chief Justice Taney delivered the opinion of the court, in which Judge Story concurred. He said: "For when the Revolution took place, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

President Lincoln in his message July 4, 1861, makes this statement, which has been quoted as authoritative:³ "The States have their *status* in the Union, and they have no other legal *status*. The Union is older than any of the States, and in fact it created them as States. Originally some independent (*i. e.*, independent of one another) colonies made the Union; and, in turn, the Union threw off their old dependence for them, and made them States such as they are. Not one of them ever had a State Constitution independent of the Union."

When it is said that "the Union is older than any of the States," it is important to analyze the statement in order to show its fallacy. It is conceded that the Union is not older

¹ 1 Story on the Constitution, ch. 4. ³ von Holst's Constitutional His-

² 16 Pet. 410. See in accord, *Pol-* *tory of U. S.*, p. 6.
lard v. Hagan, 3 How. 212.

than the colonies; that colonies, who were independent, made the Union. The union of the colonies, it is true, then, is older than the colonies in their *status* of statehood; but as the union of colonies resulted from the pre-existence of the colonies, was a union of States also consequent upon a pre-existing statehood? The united colonies were consequent upon their independence; the United States were also consequent upon the pre-existence of the States¹ as such. When it is said that the Union created the States, the fallacy of the proposition is exposed by recurring to the facts we have already so fully presented; and the assertion that not one of them ever had a State Constitution independent of the Union is met by the indubitable fact that Virginia, at least, had declared herself to be a free, sovereign and independent State, and adopted her Constitution on the 29th of June, 1776, before the united colonies, under the instructions of this same Virginia, made "the unanimous Declaration of the Thirteen United States of America."

The colony was the embryo state, entirely sovereign as to its internal polity, except as it was subject to its dependence upon England. When any colony severed the tie of its dependence on England, it became a sovereign commonwealth, or state. The union of all the colonies in making a unanimous declaration of what each in fact was, prior to the Declaration,—not what they were to be by virtue of the Declaration (as was declared in debate),¹—shows that the States were not made by the Declaration, but that the Declaration merely published the pre-existence of the States, whose freedom and independence was thus declared.

That the word "colony" and the word "state" were thus held to be synonymous, or only differing in the fact that the one was an embryo Body-politic and the other a complete Body-politic, will appear from the resolution of Congress, in which the words "United Colonies," wherever used in commissions or other instruments, should be changed to the words "United States."²

¹1 Madison Papers, p. 12.

²2 Journals of Congress, p. 328.

In concluding the discussion of this Era, if some one should ask, where did Congress get the power to make the French alliance and other treaties, and to exercise other authority, the answer may be given:

First. By the special and general powers conferred upon Congress in the separate credentials of the delegates of the several colonies.

Second. In the resolutions already cited, giving the assent of each colony to the Declaration of Independence and to the power of Congress to form alliances, by the several colonies.

Third. In their separate consent and sanction to the Declaration of Independence itself, which asserted that power.

Fourth. This is confirmed as to the treaty with France, which was proclaimed by the Congress of the United States on behalf of New Hampshire, Massachusetts, etc., all named down to Georgia, "by the grace of God sovereign, free and independent," etc., purposed to be "between the most Christian King and the Thirteen United States of North America, to wit: New Hampshire, Massachusetts Bay," etc., naming all. This was in 1778.¹

III. THE CONFEDERATION ERA, FROM MARCH 1, 1781, TO MARCH 4, 1789.

§ 133. During the Era of the Continental Congress there was an actual confederation or league between the States, not formulated in writing, but which was evidenced by the credentials, resolutions and other acts of the different States granting powers to Congress, or ratifying and sanctioning those which may have been exercised by Congress from time to time.

The Articles of Confederation which were discussed in the Congress and were finally adopted by Congress November 15, 1777, were submitted at that time to the different States for their ratification. This order of Congress says:² "These

¹ 6 Journals of Congress, p. 74, etc. ² 3 Id., p. 401.

Articles shall be proposed to the legislatures of all the United States to be considered, and if approved of by them, they are advised to authorize their delegates to ratify the same in the Congress of the United States; which being done, the same shall become conclusive."

This order of Congress conclusively shows that Congress had no right officially to adopt the Articles. Congress proposed them to the legislatures of the States, who gave them their legal sanction by their separate and independent ratification, and without the unanimous sanction of all the States it would not be binding between them. It will be remembered that up to this time all votes in the Congress were taken by States, and not by the number of delegates. It was a Congress of States, not of men.

By the new Articles of Confederation, article 9, it was provided that under these Articles Congress could not do certain things named in the Articles, unless nine States assented to the same. The purpose of this provision was to make the element of numerical strength of the States voting more potential in the decision of very important questions than it had been where a majority of States, who might be the smallest, were potential to pass every measure.

During the discussion of these Articles in Congress, it was again and again proposed to change the rule by which each State should have one vote, but the proposition was uniformly defeated; and when the provision was made by the ninth Article that nine States should be required to pass certain important measures named in that Article, the larger States proposed this amendment: "Provided, that the nine States so assenting shall comprehend *a majority of the people of the United States*, excluding negroes and Indians."

This amendment, which was suggested by the jealousy of the more populous States toward the small States, was rejected: ayes, one State; noes, nine States.

Now when (taking the census of 1890 as an index of population) nine States, with a population of 1,600,000, could

thus control four States with 2,100,000; and when in other cases where a majority of States alone could pass a measure, a majority of States with a population of a million could thus out-vote States with 2,800,000; when the power of a majority of the people of the United States was denied by a vote of nine States to one in Congress, it would seem that the idea of a paramount and sovereign Body-politic (called the United States) was derisively ignored and repudiated, even in Congress itself; nor must it be forgotten that before the Articles were adopted a majority of States always decided action, and thus if seven States representing one million people voted for a measure and six States representing 2,800,000 voted against it, it passed; or, if 2,800,000 (six States) voted for and the 1,000,000 (seven States) voted against a measure, it failed.

This fact is potential to show that States, not men, were represented in the Congress prior to 1781, and afterwards in that new Confederation, and that the theory of the one civil Body-politic, composed of fractional constituents, had no historical existence, either under the Continental Congress or in the Congress established by the Articles of Confederation.

But further: It was the anxious desire of Congress to have these Articles adopted, as essential to the maintenance of the revolutionary struggle, and the final achievement of our independence. This anxiety proves beyond controversy that the vague and indefinite powers of Congress prior to the ratification of the Articles of Confederation were deemed by Congress itself to constitute too small a measure of authority to achieve the great purpose for which it was constituted. This being the case, if Congress was sovereign, *de facto* and *de jure*, what was the obstruction to the adoption of the Articles from November, 1777, to March, 1781? This delay can only be explained by the consciousness on the part of Congress that it had no authority to assume any additional powers proposed by the Articles of Confederation until the delegation of these powers was sanctioned by the

separate States. This consciousness of lack of power in Congress is a confession of its impotency, as well as of the omnipotence of the States, as is evidenced in the abandonment, by the clear declaration of Congress, of the assertion of supreme sovereignty made for it by the school of Judge Story, von Holst, and others.

When Congress had adopted these Articles, it issued a letter to accompany the said Articles, dated November 17, 1777.¹ In that letter Congress said: "To form a permanent union, accommodated to the opinion and wishes of the delegates of so many States, differing in habits, produce, commerce, and internal police, was found to be a work which nothing but time and reflection, conspiring with a disposition to conciliate, could mature and accomplish.

". . . Let it be remarked that, after the most careful enquiry, and the fullest information, this is proposed as the best which could be adapted to the circumstances of all; and as that alone which affords any tolerable prospect of general ratification.

"Permit us, then, earnestly to recommend these Articles to the immediate and dispassionate attention of the legislatures of the respective States. Let them be candidly reviewed under a sense of the difficulty of combining in one general system the various sentiments and interests of a continent divided into so many sovereign and independent communities, under a conviction of the absolute necessity of uniting all our councils and all our strength to maintain and defend our common liberties. . . .

"We have reason to regret the time which has elapsed in preparing this plan for consideration: with additional solicitude we look forward to that which must be necessarily spent before it can be ratified. Every motive loudly calls upon us to hasten its conclusion. . . .

"In short, this salutary measure can no longer be deferred. It seems essential to our very existence as a free people, and without it we may soon be constrained to bid adieu to inde-

¹ 3 Journals of Congress, pp. 404, 405.

pendence, to liberty and safety; blessings which, from the justice of our cause, and the favor of our Almighty Creator visibly manifested in our protection, we have reason to expect, if in an humble dependence on his Divine Providence we strenuously exert the means which are placed in our power.

“To conclude, if the legislature of any State shall not be assembled, Congress recommend to the executive authority to convene it without delay; and to each respective legislature it is recommended to invest its delegates with competent powers ultimately in the name and behalf of the State to subscribe articles of confederation and perpetual union of the United States; and to attend Congress for that purpose on or before the — day of —.

“On motion to fill up the blanks with ‘first’ and ‘May next,’” etc.

On the 1st of March, 1781, the Journal of Congress states that “two of the delegates from the State of Maryland, in pursuance of the act of the legislature of that State,” . . . did, “in behalf of the said State of Maryland, sign and ratify the said articles, by which act the confederation of the United States of America was completed, each and every of the Thirteen United States, from New Hampshire to Georgia, both included, having adopted and confirmed, and by their delegates in Congress ratified the same, as follows: To all to whom these presents shall come, we, the undersigned delegates of the States affixed to our names, send greeting: Whereas, the delegates of the United States of America in Congress assembled, did, on the 15th day of November, in the year of our Lord 1777, and in the second year of the independence of America, agree to certain articles of confederation and perpetual union between the States of New Hampshire, Massachusetts Bay (all being named down to Georgia), in the following words to wit.”

The caption of these Articles is in these words: “Articles of Confederation and Perpetual Union, between the States of New Hampshire, Massachusetts Bay (all named down to

Georgia).” These Articles were signed thus: “Josiah Bartlett, John Wentworth, Jr., August 8, 1778, on the part and behalf of the State of New Hampshire,” and in the same manner by all the other delegates on the part and behalf of the respective States they represented. The Journal of Congress opens on the next day thus: “The United States in Congress assembled, March 2nd, 1781. The ratification of the articles of confederation being yesterday completed by the accession of the State of Maryland, the United States met in Congress, when the following members appeared,” etc.¹ Thus, by the record of Congress itself, it appears that the Articles of Confederation never went into effect until they were separately ratified by the authority of the legislature of each State.

§ 134. We will now note analytically the contents of these Articles.

First. They are described as Articles of Confederation and Perpetual Union *between the States* of New Hampshire, Massachusetts Bay, etc. The parties *between* whom the Articles were made are States—not men. They constituted a confederation and union between *States*.

Second. Article 1 declares: “The style of this Confederacy shall be *The United States of America*.” The baptismal name of this Confederacy is “*The United States of America*.” Therefore, the United States of America designates a confederacy between States.

Third. Article 2 declares: “Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this Confederation expressly delegated to the United States in Congress assembled.”

(a) The distinction between “sovereignty, freedom and independence,” and the words “every power, jurisdiction and right,” must be noted. This distinguishes sovereignty as the indivisible essence from powers, which are emanations from the sovereignty. “The sovereignty, freedom and in-

¹7 Journals of Congress, pp. 37-45.

dependence" of each State is retained by each State,—*i. e.*, retains (*re* and *teneo* —holds back) what it had already possessed,—holds it back as not intended to be granted, but clearly to be retained. Holds back from whom? Clearly from the United States in Congress assembled. Then how could Congress have had a paramount sovereignty when the States retained it from Congress,—*i. e.*, held it back as the present possession of each State, and which Congress had not previously possessed and was not intended, therefore, to possess?¹

(b) Then, what "powers, jurisdiction and right" are respectively, under the Articles, held by the respective States and by Congress? The article declares in express terms that each State retains "every power, jurisdiction and right" which is not by this Confederation expressly delegated to the United States in Congress assembled. "Every power, jurisdiction and right" which, under the Articles, Congress possessed, was by *express delegation* granted to the Congress by the Articles of Confederation. The powers not so expressly delegated are expressly retained by each State. It is therefore clear that each State retained its sovereignty, freedom and independence intact and undivided, and every power, jurisdiction and right by original title, which was not expressly delegated to Congress, and those so expressly delegated to Congress were not inherent in Congress, but only belonged to Congress by derivation from the States.

This article reflects clear light upon the questions we have already discussed under the Continental Congressional Era, and condemns the theory that, during that Era, Congress was *de facto* and *de jure* sovereign, or had any power, jurisdiction and right which was not derived by delegation from the States respectively.

The clause, therefore, not only shows that, under the Confederation established by the Articles, each State retained, intact and indivisible, its sovereignty, freedom and independ-

¹ See, on this point, Mr. Justice Matthews, in *Yick Wo v. Hopkins*, 118 U. S. 370.

ence, but every power, jurisdiction and right which the States did not delegate to Congress by the terms of the Articles; but shows further, that in all the Continental Congressional Era, prior to the adoption of the Articles, this relation between the States and Congress had, for a stronger reason, always existed. For if the Articles of Confederation were intended to increase the functional powers of Congress beyond what it had exercised during the Continental Congressional Era, then the status established by the Articles of Confederation must, *a fortiori*, have existed under the Continental Congressional Era.

Fourth. Article 3 declares: "The said States hereby severally enter into a firm league of friendship with each other for their common defense," etc.

Every word here conveys the idea of separate and independent action. The States *severally* entered into a firm league with each other. They do not consolidate themselves into one people, nor are they one people entering into these Articles of Confederation. They are the *several* States making with each other a *league* — which means a bond or obligation or covenant between parties by which each binds itself to the other to do or allow certain things. It is an alliance between independent States to which each is a party, self-bound to the others in respect to matters mentioned in the instrument constituting it. It excludes absolutely the idea that the parties to the league are the fractional parts of one nationality.

Fifth. In the fourth Article, intercourse and the intercommunication of the privileges and immunities of citizenship are secured, with the exception of paupers, vagabonds and fugitives from justice; also the extradition of fugitives from justice is secured, and also full faith and credit is given in each of these States to the records, etc., of every other State.

This Article is very instructive upon the relations between the people of the different States. It absolutely negatives the idea that the people of all the States were equal mem-

bers and citizens of one civil Body-politic, and affirms that the citizens of each State had their own peculiar privileges and immunities secured by their sovereign State, which by these Articles were, in a limited degree, secured to the citizens of every other State; so that no citizen of any State had any inherent privilege or immunity of citizenship in any other State, except as it was conferred by this league and agreement among the several States. The grant of these privileges and immunities disproves the assertion that they pre-existed without the grant, and establishes the absolute independence of each one of the States and their power to grant or withhold the privileges and immunities of citizenship to or from citizens of other States.

Sixth. Article 5 provides that each State shall annually appoint, in such manner as its legislature shall direct, delegates to Congress, with power reserved to each State to recall its delegates, etc. It also provides that each State shall maintain its own delegates "in any meeting of the States" (a phrase which indicates that Congress was a meeting of States). Each State in Congress had but one vote, and this despite the numerical power of the different States.

Seventh. Article 6 contains limitations self-imposed by the States upon themselves. Limitations agreed to because the exercise of the prohibited functions by a State would be inconsistent with the powers delegated expressly to Congress.

Eighth. Very important powers were delegated expressly to Congress, all of them looking to the general interest and common defense of the States of the Confederation. But while the powers were very large the limitations on them were very great. Congress could lay no taxes, nor raise money but by loans and the emission of bills of credit, and by requisition on the States for their quotas of the fund necessary for the common defense and general welfare. These quotas, which were to be paid by the States, were to be laid and levied by the legislatures of the several States, which in practice they very often refused to do. So that Congress, in the matter of money for carrying on a war for

common defense, was absolutely dependent upon the will of each State to comply with its requisition for the States' quotas. (See Article 8.) Furthermore, troops were to be raised, not by the power of Congress, but by the States themselves, and this was done upon an admission of Congress, that, if the States refused, Congress could not enforce it. Officers in command of such troops, and below the rank of colonel, were appointed exclusively, under the authority of the States. The general officers only were appointed by the Congress of the United States. (See Article 7 and Article 9.)

Ninth. Many of the most important powers delegated to Congress could only be exercised when nine States assented to the same; and all other questions, except as to adjournment from day to day, by a vote of a majority of the United States in Congress assembled.

The regulation of commerce was left to the States, though Congress could make treaties of commerce. Congress was authorized to complete and equip a navy. Congress had the power of war and of treaty-making.

Tenth. The Articles could be amended by Congress when confirmed by the legislatures of every State.

§ 135. The letter of Congress transmitting these Articles to the States for ratification has already been referred to. In this letter Congress urges upon the States the adoption of the Articles, "as essential to our very existence as a free people, and without it we may soon be constrained to bid adieu to independence, to liberty and safety."

Looking at the terms of these Articles which increased the power of Congress in important respects beyond the powers exercised by it under the Continental Congressional Era, we may well ask whether this language of Congress is that of a paramount sovereign to its dependent vassals — of the *de facto* and *de jure* sovereignty demanding so eagerly from its subordinate provinces more power in order to greater efficiency; and if these Articles conferred larger powers than Congress had previously possessed, what becomes of the hypothesis of

its sovereignty so confidently asserted? How does this central sovereign, which, as Judge Story asserts, was the creator of these States, come to beg of these—its creatures—only enough power to save itself from extinction? These questions can only be resolved by one answer: That Congress was, and had ever been, the delegated agent of the several States; each of which had, since the moment of its self-assumed independence, been possessed of that which under these Articles of Confederation they expressly retained, to wit: sovereignty, freedom and independence, as well as every power, jurisdiction and right which it had not by its own will delegated to the Congress by the credentials furnished to its separate delegates. After the Confederation went into operation on the 1st of March, it for the first time began to legislate and enact ordinances under the powers vested in it. This it had never done before, except in matters relating to its own organization.

The revolutionary struggle closed with the treaty of peace, ratified by Congress on the 14th of January, 1784. In this treaty there are certain provisions important now to be noticed. Congress made and ratified the treaty, and its first article contains this declaration: "His Britannic Majesty acknowledges the said United States, viz.: New Hampshire, Massachusetts Bay (naming all down to Georgia), to be free, sovereign and independent States; that he treats with *them* as such, and for himself, heirs and successors, relinquishes all claim to the government, property and territorial rights of the same, and every part thereof."

The treaty purported to be made, not between Congress and Great Britain, but between the United States of America and Great Britain, and the freedom, sovereignty and independence of the States as such was acknowledged, as also that the treaty was made "with them as such," and that his Britannic Majesty relinquished "all claims to the government, property and territorial rights of the same." The independence which the States had declared for themselves as free, sovereign and independent States was thus confirmed

by the acknowledgment and concession of his Britannic Majesty.

§ 136. One other important act during the Confederation Era remains to be noted.

Virginia, by deed dated March, 1784, executed by her delegates in Congress under her authority, conveyed her northwestern domain, which was held by the double title of charter and conquest (now five States containing nearly 15,000,000 people), to the United States in Congress assembled, for the benefit of said States, and all her right, title and claim as well of soil as jurisdiction, on certain conditions, one of which was that the territory should be formed into States, "and that the States so formed shall be distinct republican States, and admitted members of the federal union; having the same rights of sovereignty, freedom and independence as the other States. . . . That all the lands . . . so ceded . . . shall be considered as a common fund for the use and benefit of such of the United States as have become or shall become members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."¹

Congress accepted the deed. This deed made by Virginia and accepted by Congress operates an estoppel upon Congress to deny its provisions. It proves:

First. That Virginia, and not Congress, had exclusive right of soil and jurisdiction to the territory thus ceded.

Second. That the territory was laid out into *distinct* States.

Third. They were to be admitted into a *federal* union,—*i. e.*, they were not parts of one civil Body-politic, but were to be admitted into the federal union established by the Articles of Confederation.

Fourth. These new States were to have the same rights of

¹ 9 Journals of Congress, pp. 47-51.

sovereignty, freedom and independence *retained* by the original State in the second of the Articles of Confederation.

Fifth. The relation between the States was described as a confederation of federal alliance (*foedus* — compact).

Sixth. Each State as such was to have a separate claim on the fund arising from the sale of land so ceded.

Seventh. The Congress under the present Constitution has recognized this separate right of each State to a share of the proceeds of sales of public lands, by distributing them among the States.

§ 137. The facts thus presented are confirmed by the highest judicial authority.

In *Gibbons v. Ogden*,¹ Marshall, C. J., says, speaking of the relation of the States to each other prior to the present Constitution: "It has been said that they (the States) were sovereign, were completely independent, and were connected with each other by a league. This is true." In this language he spoke the opinion of the whole court, of whom Judge Story was one. If this was true under the Articles of Confederation, *a fortiori* was it true before their adoption in March, 1781.

In *Wheeler v. Smith*,² Mr. Justice M'Lean, speaking for the whole court, said: "When this country achieved its independence the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the Federal government. . . . The State, as a sovereign, is the *parens patriæ*."³

In the celebrated *Dartmouth College Case*⁴ this whole view is sustained. The college was chartered by the crown. The court held that New Hampshire succeeded to the royal prerogative, and was bound by royal compact expressed in the charter — a contract to which the State succeeded and the obligation of which the State could not impair by any act of its legislature. If Judge Story's view be correct that Con-

¹ 9 Wheat. 187.

³ Id. 35.

² 9 How. 33.

⁴ 4 Wheat. 463-534.

gress was the sovereign, *de facto* and *de jure*, why did not Congress succeed to the prerogative of the crown and to the obligation upon it through the charter of Dartmouth College?

Without doubt it may then be regarded as conclusively settled by history that under the Articles of Confederation and previous to their adoption, the States as free, sovereign and independent States were united in a league, confederation or alliance; that the name of this confederacy was the United States of America; that it was a confederacy whose units were States; that the Articles were a compact and agreement between States; and that the United States of America were not one civil Body-politic whose units were men.

IV. THE CONSTITUTIONAL ERA, FROM MARCH 4, 1789, TO 1861.

§ 138. It has been shown by the terms of the Articles of Confederation that each of the States retained its sovereignty, freedom and independence. It may be well before proceeding further to point out succinctly the action of each State in respect to its own constitution and internal polity.

Connecticut,¹ in 1776, made a "Declaration of the Rights and Privileges of the People of this State," in which, holding to its ancient form of civil government contained in its original charter, it declared that "The People of this State, being by the Providence of God free and independent, have the sole and exclusive Right of governing themselves as a free, sovereign and independent State;" that the Charter "shall be and remain the Civil Constitution of this State, under the sole authority of the people thereof. . . . And that this Republic is, and shall forever be and remain, a free, sovereign and independent State, by the Name of the *State of Connecticut*." This continued to be the Constitution of Connecticut until 1818.

Delaware,² August 27, 1776, in convention, adopted a Con-

¹ Charters and Constitutions, Part 1, pp. 257-58.

² *Id.*, pp. 273, etc.

stitution for the State of Delaware. By this Constitution a Great Seal of the State was adopted. Commissions and writs were to "run in the name of 'The Delaware State.'" Indictments to conclude, "Against the peace and dignity of the State." All persons appointed to office should make oath to "bear true allegiance to the Delaware State," etc.

Georgia,¹ in convention, adopted a Constitution in which the oath of every voter and every officer was required to be taken to "bear true allegiance to the State of Georgia."

Maryland,² in convention August 14, 1776, established a Constitution declaring: "That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof." All officers were required to take oath to "bear true allegiance to the State of Maryland." All commissions and grants were to be in the name of "The State of Maryland;" and all indictments "Against the peace, government and dignity of the State."

Massachusetts,³ in convention March 2, 1780, framed a Constitution which was submitted to the people, and ratified by more than two-thirds of those who voted. It ordained "The Constitution of the Commonwealth of Massachusetts," which it designated as "an original, explicit and solemn compact with each other:" viz., the people of Massachusetts. It declared that the people inhabiting the territory "do hereby solemnly and mutually agree with each other to form themselves into a free, sovereign and independent Body-politic or State, by the name of the Commonwealth of Massachusetts." Every person chosen to office was required to take an oath that he truly and sincerely acknowledged that "the Commonwealth of Massachusetts is, and of right ought to be, a free, sovereign, and independent State," and that he "will bear true allegiance to the said Commonwealth; that no power, jurisdiction or authority can be exercised within this Commonwealth, "except the authority or power which is or may be vested by their constituents in the Con-

¹ Id., pp. 377, etc.

³ Id., pp. 956, etc.

² Id., pp. 817, etc.

gress of the United States." Writs and commissions were to be in the name of the Commonwealth of Massachusetts, with the Great Seal of the Commonwealth attached.

New Hampshire,¹ after having established a temporary government for the colony of New Hampshire, January 5, 1776, afterwards, in convention, framed a Constitution, which was submitted for ratification by the votes of the people, and went into effect June 2, 1784. It declared that the people inhabiting the territory "do hereby solemnly and mutually agree with each other to form themselves into a free, sovereign and independent Body-politic, or State, by the name of the *State of New Hampshire*." Every person elected to office shall make oath that he sincerely acknowledges "that the State of New Hampshire is, and of right ought to be, a free, sovereign and independent State," and an oath of true allegiance to the same.

New Jersey,² in a convention of the people, adopted a Constitution July 3, 1776, in which New Jersey was spoken of as a "colony." The Constitution was adopted with a view of possible reconciliation with Great Britain, but if no such reconciliation occurred, then to remain firm and inviolable. September 20, 1777, this Constitution was amended by substituting the words "State" and "States" for "colony" and "colonies." It adopted a great seal, directed commissions to issue in the name of "the Colony of New Jersey," and all indictments to conclude, "Against the peace of the colony, the government and dignity of the same." This Constitution continued in force until 1844.

New York,³ on the 28th of April, 1777, in convention of the people of New York, declared that no authority over the people of this State shall be exercised "but such as shall be derived from a grant by them." All writs were to run in the name of "the People of the State of New York." The instrument further provided for the naturalization of

¹ Charters and Constitutions, Part
2, pp. 1280, etc.

² Id., pp. 1310, etc.

³ Id., pp. 1328, etc.

foreigners by their taking "an oath of allegiance to this State."

North Carolina,¹ in December, 1776, adopted a Constitution, making all commissions and writs to run in the name, and indictments to conclude against "the peace and dignity of the State." And that "the people of this State are to have the sole and exclusive right to regulate the internal government and police thereof."

Pennsylvania,² in convention, September 28, 1776, established a "Constitution of this Commonwealth." It established a State seal; all commissions to be by authority of the "freemen of the Commonwealth of Pennsylvania," and all indictments to conclude "Against the peace and dignity of the same." Official oaths to be true and faithful to the Commonwealth of Pennsylvania.

Rhode Island:³ In 1643 a patent for Providence Plantations was issued. In 1663 Charles II. granted a charter to Rhode Island and Providence Plantations, under which the people of the State of Rhode Island lived until the year 1842, when, by a convention duly elected by the people, a Constitution was adopted and ratified by the people in November, 1842.

South Carolina,⁴ in November, 1778, established a Constitution for "the State of South Carolina," and required an oath of its officers of acknowledgment that the State of South Carolina is "a free, sovereign and independent State." This was adopted by the General Assembly of South Carolina, and was held by the courts to be repealable at pleasure. A Constitution was adopted by South Carolina in 1790.

Virginia,⁵ on the 29th of June, 1776, adopted a Constitution, after having adopted a Declaration of Rights on the 12th of June, 1776. The commissions, grants and writs were to run in the name of the "Commonwealth of Virginia," and indictments to conclude "Against the peace and dignity of

¹ Id., pp. 1409, etc.

⁴ Id., pp. 1620, 1628.

² Id., pp. 1540, etc.

⁵ Id., pp. 1888, etc.

³ Id., pp. 1595, etc.

the Commonwealth." "All escheats heretofore going to the king shall come to the Commonwealth." Officers were required to take the oath of allegiance to the Commonwealth.

This review of the separate action of the different States shows that each exercised its sovereignty, freedom and independence in accordance with the terms of the second article of the Confederation, until the adoption of the Constitution of 1789.

§ 139. The questions which we shall now consider are of great importance.

First. Who ordained the Constitution, and what is it?

Second. What are the relations of the States to the Government thereby established, and *inter se*? Is the Union organic or functional? Is it *staaten-bund* or *bundes-staat*? Is a new civil Body-politic created by it? If so, are its units States or men?

§ 140. In answer to the first question it will be shown that the States, as free, sovereign and independent civil bodies-politic, ordained the Constitution; that it is a federal compact between the States as bodies-politic, by which the government has been established, which is a Democratic-Republican and Federal government; supreme within the limits of the delegated powers over all the constitutions and laws of the several States, and binding and operating upon the citizens of all the States, and by its terms certain rights and privileges of the citizens of each are intercommunicated to those of every other. In considering the causes which led the States to change all the Articles of Confederation into the present Constitution, we may state that the Confederation had two leading vices, in the opinion of those who were earnest advocates for the change.

Mr. Hamilton says:¹ "The great and radical vice, in the construction of the existing confederation, is in the principle of *legislation for States or governments*, in their *corporate* or *collective capacities*, and as contradistinguished from the *indi-*

¹ The Federalist, No. XV.

viduals of whom they consist. . . . The United States have an indefinite discretion to make requisitions for men and money; but they have no authority to raise either, by regulations extending to the individual citizens of America. The consequence of this is, that though, in theory, their resolutions concerning those objects are laws, constitutionally binding on the members of the union; yet in practice, they are mere recommendations, which the States observe or disregard at their option."

The second vice of the Confederation is stated by the same writer in the following language:¹ "It has not a little contributed to the infirmities of the existing federal system that it never had a ratification by the *people*. Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers; and has, in some instances, given birth to the vicious doctrine of a right of legislative repeal. Owing its ratification to the law of a State, it has been contended that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that a *party* to a *compact* has a right to revoke that *compact*, the doctrine itself has had respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of *the consent of the people*. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority."

§ 141. We will consider this latter evil first.

The Articles of Confederation were ratified by the legislature of each State. This was the *delegated* authority. The *people* of the State—the sovereign *de facto*—never ratified it. The Constitution of each State, as we have seen, rests upon the will of the people of the State as the sovereign civil Body-

¹ The Federalist, No. XXII.

politic. The source of authority for the Constitution of a State is, therefore, higher than that of the Articles of Confederation, and it might plausibly be held that the higher authority of the Body-politic might revoke and supersede the Articles of Confederation adopted by the delegated authority. This possible exercise of the repealing power is what Mr. Hamilton refers to, and he maintains with conclusive force that, if the bond of the Confederation was based on the obligations of the several sovereign bodies-politic, instead of their several legislatures, the compact between the sovereign States would be superior in force even to the Constitution of the State adopted by the Body-politic itself. He therefore maintains that the new Constitution ought to have the sanction of the delegating authority and not merely of the delegated authority of the legislatures.

So Mr. Madison, in speaking of the proposed Constitution, says:¹ The convention "must have borne in mind that as the plan to be framed and proposed was to be submitted *to the people themselves*, the disapprobation of this supreme authority would destroy it forever; its approbation blot out all antecedent errors and irregularities."

We now proceed to consider the question proposed. By whom was the Constitution of the United States ordained? By the legislatures of the States? By the convention of delegates from the States? By the people of the United States as one Body-politic? Or by the people of the several States as distinct and independent bodies-politic? This is a question of historic fact—not of theory.

§ 142. A sketch of the leading events which led to the adoption of the Constitution in 1789 will now be attempted.

When Virginia, in May, 1776, instructed her delegates to propose to the Congress, not only the Declaration of Independence, but that a confederation be formed to bind the colonies more closely together, Congress set to work to frame the Articles of Confederation as the best form of con-

¹ The Federalist, No. XL.

federation that could then be devised so as to meet with acceptance by the States. During the period which elapsed before the Articles of Confederation were finally adopted in March, 1781, the thoughtful minds of the era, under the pressure of a desperate struggle for independence, and the inadequacy of so loose a confederation to achieve independence, began very strongly to conceive the idea that, after independence was achieved, its maintenance and perpetuation could only be accomplished by a confederated union of the States, with larger powers in the Federal government, and based upon the sovereign will of the people. It is curious to see how, even before the ratification of the first plan of the Federal Constitution, the minds of men had grown beyond their first conception, and saw the need of a better adjusted scheme of government than that which had been proposed and was not yet adopted.

As early as August, 1780, six months before the ratification of the Articles of Confederation, a convention of the New England States, at Boston, declared for a more solid and permanent union, with one supreme head and "a Congress competent for the government of all those common and national affairs which do not nor can come within the jurisdiction of the particular States." The convention issued an invitation to the New England States, New York, and "others that shall think proper to join them," to meet at Hartford.¹ This convention of the four New England States and New York assembled at Hartford, November 11, 1780. It was proposed by them to provide by taxes and duties an inalienable revenue to discharge the interest on the public debt. These proposals were sent to every State in the Union, to General Washington and to Congress.

Congress proposed to the States, February 3, 1781, to vest Congress with power to lay a five per cent. duty on certain imports, the money arising from said duties to be applied to the payment of the public debt.² In 1782, New York,

¹ Bancroft's History of the Const. ² 7 Journals of Congress, p. 22.
U. S., ch. 1, p. 12.

reciting the public embarrassments from the want of a sufficient power in Congress to provide for itself a revenue, invited Congress "to recommend and each State to adopt the measure of assembling a general convention of the States specially authorized to revise and amend the confederation, reserving a right to the respective legislatures to ratify their determinations."¹

On the 18th of April, 1783, after peace was declared, Congress proposed that the States should invest it with power to levy certain duties upon imports for the sole purpose of paying the principal and interest of the public debt, and to provide for a further revenue to be furnished by the States on a fixed quota for twenty-five years; no State to be bound by its consent to this proposal until all accede thereto, after which "they shall be considered as forming a mutual compact among all the States, and shall be irrevocable by any one or more of them, without the concurrence of the whole, or of a majority of the United States in Congress assembled." This proposal was never acceded to.

Virginia, December 4, 1783, unanimously consented to empower Congress to adopt the most effectual mode of counteracting the restraints on American navigation so long as they should be continued.² This declaration was sent to Congress and the States. This action by Virginia was no doubt due to the British order in council, July 2, 1783, which restrained all commerce between American ports and the British West Indies to British bottoms.

Congress thereupon, April 30, 1784, proposed to the States to vest in Congress for the term of fifteen years the power to prohibit any goods, wares or merchandise from being imported into, or exported from, any State in any vessel belonging to or navigated by the subjects of any power with whom these States shall not have formed treaties of com-

¹ Bancroft's History of the Const. U. S., ch. 2, pp. 38, 39.

² 2 Henning's Statutes at Large, p. 313.

merce. Such act of Congress required the assent of nine States to its passage.¹

These tentative propositions indicated in the strongest way the public sense of the first vice of the Articles of Confederation already referred to, which was that Congress legislated for States, and dependently through States upon the citizens thereof. It could will, but could not do. It could ask and recommend, but could not enforce. Its will to be effectual required the concurrence of all the States as separate and distinct Bodies-politic. It could raise no revenue, but could only make requisitions; could lay no tax, but only ask the States to do so. This absolute dependence of Congress, charged with the conduct of a great war for independence, upon the consent — sometimes it might be capricious consent — of the different States, created a condition of pitiable imbecility of power which is a mockery of the claim of its then sovereignty, *de facto* and *de jure*.

§ 143. But another question of great consequence had arisen. The States under the confederation had the power of regulating commerce with foreign nations. The adverse regulations of foreign powers in respect to trade with the American States could be countervailed only by the separate and independent action of each State, and the several States, instead of combining in a uniform policy of retaliation against the hostile measures of foreign nations, were competing with each other as rivals to secure separate advantages to themselves by special regulations of commerce adopted by each. The effect of this was seen by the statesmen of the era to be on the application of the maxim "*divide et impera*," to give to foreign nations the complete control of all our commercial interests by dividing the States and preventing their union upon some uniform system of countervailing the hostile policy of these foreign nations.

It was against this policy that the proposition of Virginia, just referred to, was made, and showed the proper and states-

¹9 Journals of Congress, pp. 133, 134.

manlike views of our statesmen upon the important question of foreign commerce in the United States.

Mr. Jefferson, whose report in 1783 in Congress on foreign affairs looked rather to freedom of navigation and commerce from all restraints, and to many reforms in respect to commerce in times of war (many of which he attributes to the suggestion of Dr. Franklin), puts this subject in a very terse form in a letter of February 8, 1786, to Mr. Madison, from which we quote as follows: "The politics of Europe render it indispensably necessary that with respect to everything external we be one nation only and firmly hooked together: the internal government is what each State should keep to itself." And in a letter December 16, 1786, he says: "To make us one nation as to foreign concerns and keep us distinct in domestic ones gives the outline of the proper division of power between the general and particular governments." These views were consonant with the instructions drafted by him for our foreign ambassadors in 1784, in which he, as to treaties with foreign nations, described the United States as one nation. Mr. Bancroft¹ has given the letters of Hamilton, Adams, Madison, and others of that period, which all show the march of public opinion towards a remedy for the felt evils of a lack of Federal power to raise its own revenue, and towards countervailing by Federal legislation the political war of foreign nations on our commerce and on our navigation.

Perhaps the most influential, as it was the most powerful, statement of the need of a new Constitution, is found in the letter of George Washington, dated June, 1783, after peace was declared, but before his resignation of his commission to the people for whose independence he had drawn his sword. He published it as his legacy to his country.

The confessed inadequacy of the Articles of Confederation, and the broad and prophetic statesmanship of the leading minds of that era, ripened the public judgment for the

¹ History of the Const. U. S., vol. 1.

reception of any proposal which might be made by any Commonwealth in the direction of a better confederate union. An opportunity was furnished by a local necessity for the establishment of some commercial regulations between the States of Maryland and Virginia in respect of the commerce on the Potomac River and on Chesapeake Bay common to both States. A meeting of commissioners from these States was arranged for the 28th of March, 1785, at Mt. Vernon, under the auspicious roof of Washington. The commissioners prepared the terms of a compact and made a report, which was laid before their respective legislatures. By way of enlarging the policy adopted between these two States, Madison moved in the Virginia legislature to give to Congress power over the trade of the nation.¹ The proposal met with opposition and was laid over for a time. Washington, being invited to offer suggestions, said: "If the States individually attempt to regulate commerce, an abortion, or a many-headed monster, would be the issue. If we consider ourselves, or wish to be considered by others, as a united people, why not adopt the measures which are characteristic of it and support the honor and dignity of one? If we are afraid to trust one another under qualified powers there is an end of the union."²

Maryland, in announcing to Virginia her adhesion to the compact agreed upon by the joint commission, proposed that commissioners from all the States should meet in convention to regulate American commerce. Madison, taking advantage of this suggestion of Maryland's, proposed a resolution, through Mr. Tyler, for the appointment of commissioners from Virginia and all the other States to digest and report the requisite augmentation of the powers of Congress over trade, their report to be of no force until it should be unanimously ratified by the several States.³

The resolution passed both branches of the legislature by

¹ 1 Rives' Madison, pp. 201, 202.

³ 2 Rives' Madison, p. 60.

² Bancroft's History of the Const.

U. S., ch. 7, p. 251.

a large majority. Madison was one of the commissioners appointed. Other States acceded to this proposal, and a convention met at Annapolis September 11, 1786, of five States only: New York, New Jersey, Pennsylvania, Delaware and Virginia. New Jersey, in her response to the overture of Virginia for this convention, made an important addition to the purposes of the Annapolis convention, which seems to have been suggested by another movement.

Mr. Charles Pinckney, of South Carolina, as one of the committee sent by Congress to the legislature of New Jersey, on the 13th of March, 1786, urged upon that body the calling of a general convention of the States for the purpose of increasing the powers of the Federal government and rendering it more adequate to the needs for which it was instituted.¹ New Jersey thereupon empowered her commissioners to the Annapolis convention "to consider how far a uniform system in their commercial regulations and *other important matters* might be necessary to the common interest and permanent harmony of the several States; and to report such an act on the subject as, when ratified by them, would enable the United States in Congress assembled effectually to provide for the exigencies of the union."²

This important advance upon the Virginia proposition was valuable as a suggestion, but as only five States attended at Annapolis, the convention, September 14, 1786, adjourned, after issuing an address drawn by Hamilton and signed by John Dickinson, its venerable president. In that address, the convention, adverting to the suggestions of New Jersey, proposed to their constituent States to obtain the concurrence of the other States to meet in convention at Philadelphia on the second Monday in May, 1787, to take into consideration and advise further measures "to render the Constitution of the Federal government adequate to the exigencies of the union."

¹ Bancroft's History of the Const. ² Id.
U. S., pp. 256-57.

. Congress failed to act promptly upon this proposition and the movement halted; but early in November, 1786, Virginia, on Madison's motion, unanimously passed an act for the appointment of commissioners to the convention at Philadelphia, who "are hereby authorized as deputies from this Commonwealth to meet such deputies as may be appointed and authorized by other States to assemble in convention at Philadelphia, as above recommended, and to join with them in advising and discussing all such alterations and further provisions as may be necessary to render the Federal Constitution adequate to the exigencies of the Union; and in reporting such an act for that purpose to the United States in Congress, as, when agreed to by them and duly *confirmed by the several States*, will effectually provide for the same."¹

Other States followed in accord with this action. Congress on the 21st of February, 1787, basing its action on the power of amendment of the Articles of Confederation by the assent of Congress and of the legislatures of the several States, resolved that it was expedient, in its opinion, "that on the second Monday in May next, a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures, such alterations and provisions therein, as shall, when agreed to in Congress and confirmed by the States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union."²

§ 144. It is now in order to consider the question previously propounded: Who ordained the Constitution of the United States?

We remarked that all the States appointed their delegates to this convention by their legislatures except Rhode Island,

¹ 12 Henning's Statutes at Large, p. 256.

² 12 Journals of Congress, pp. 13, 14.

which never appeared in the convention. New York never gave a vote after July 10th. There were never more than eleven States present at any session. The avowed object of the convention was, as stated in the resolutions before cited and especially that of Congress, for the sole and express purpose of revising the Articles of Confederation and reporting such provisions as shall make the Federal Constitution adequate, etc. We remarked further¹ that these Articles are called "The Federal Constitution," that is, the constitutional compact between the States.

Each State, in its credentials to its delegates, required all action by the convention to be confirmed by itself to be binding. Virginia said: "Confirmed by the several States,—not by their legislatures." The proceedings of this convention may be found in the Journal of the Convention published by Congress, and in the reports of its proceedings and debates by James Madison. Mr. Madison's account states that a small number of delegates assembled on the day fixed for the meeting and that "seven States were not convened until Friday, May 25th." The official journal, calling it "The Federal Convention," opens thus: "In virtue of appointments from their *respective States*, sundry delegates to the *Federal Convention* appeared; but a *majority of the States* not being represented," there was an adjournment.¹

George Washington was made President. The rules adopted by the convention declared that the house to do business shall consist of the deputies of not less than seven States, each State having one vote. The Journal states the Constitution passed in the affirmative, all the States concurring. The last clause of the Constitution declares: "Done in convention by the unanimous consent of the States present." All States answered "aye."²

The nineteenth resolution in Mr. Randolph's plan read in these words: "That the amendments which shall be offered

¹ Madison Papers, p. 721; Journal of the Federal Convention, p. 59.

² Id., pp. 388, 389.

to the confederation by the convention ought at a proper time, or times, after the approbation of Congress, to be submitted to an assembly or assemblies recommended by the several legislatures to be expressly chosen by the people to consider and decide thereon.”¹

In the discussion of this resolution Mr. Ellsworth moved to refer it to the legislatures of the States for ratification. Colonel Mason said: “The legislatures have no power to ratify it. They are the mere creatures of the State Constitution and cannot be greater than their creators.” Mr. Madison held that, as the proposed Constitution made essential inroads on the State Constitutions, it was not competent for the legislature to ratify the Federal Constitution, which changed the State Constitution.

Mr. Ellsworth’s motion was defeated: ayes, 3; noes, 7. Mr. Gouverneur Morris moved that a reference of the plan be made to one general convention chosen and authorized by the people to consider, amend and establish the same. This was not even seconded. To submit it to assemblies chosen by the people, as stated in the nineteenth resolution: ayes, 9 States; noes, 1 State.

Mr. Hamilton, towards the close of the convention, proposed that the plan be transmitted to Congress, and if agreed to by them, then to be communicated to the legislatures of the several States to the end of its final ratification by the convention of deputies in each State to be chosen by the people thereof, etc. One State voted for and ten against it; seemingly because it made the ratification of the Constitution to depend upon its approval or rejection by Congress.²

It was then finally agreed that “this proposition shall be laid before the United States in Congress assembled, and it is the opinion of this convention that it should be afterwards submitted to a convention, or delegates chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification, and that each

¹Madison Papers, p. 861.

²Id., p. 1539.

convention assenting to and ratifying the same should give notice thereof to the United States in Congress assembled." Accordingly Congress, on the 28th of September, 1787, having received the report of the convention, resolved unanimously to transmit the said report, with the resolutions and letter accompanying the same, to the several legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolutions of the convention made and provided in that case.

That the Federal Convention ordained the Constitution of the United States seems to be the idea of a late writer, Mr. Burgess.¹ He seems to hold that this convention itself constituted the States one people. That it was the representation of the sovereign State, of which the several States, or Commonwealths as he calls them, were fractional parts.

This theory is novel, but not sound. The historic facts already set out show that the delegates were elected by the State legislatures, and with power to revise the Articles of Confederation and report back such measures as they adopted for confirmation. But how could they,—creatures of the sovereign States, as they were by the second of the Articles of Confederation,—adopt any plan by which the thirteen sovereigns were to be merged into one sovereignty? Even if the convention had attempted it, the act would have been futile.

We have, however, shown before, that when this convention proposed to refer it back to the legislatures for ratification, it was voted down for the very reason already stated,—that the legislatures had no power to ratify the Constitution framed by the convention; and as we have shown, it was a vice of the old Articles of Confederation that they were ratified by the legislatures, and, as Mr. Hamilton states, it was the purpose of the convention to cure that vice by making the Constitution rest for its validity on the ratification of the people of the several States.

¹Burgess, *Political Science and Constitutional Law*, p. 138, etc.

Again, the resolution by which the Constitution was referred for ratification to a convention elected by the people in each State, without whose ratification it would not be binding on such State, is conclusive to show that the convention claimed no sovereign power, but actually disclaimed it.

The convention adjourned on the 17th of September, 1787. By the terms of the Constitution itself, "the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same."¹ Thus, the convention which proposed this Constitution did not establish it, but made its establishment dependent upon the ratification of nine States essential to its authority in any one of them, and excluded any four who refused to ratify it from any obligation whatever to the Constitution; so that until nine States ratified it, it was not established at all as to any State, and when nine States ratified it, it was only established between those so ratifying the same. That the Constitution never went into effect until the 4th of March, 1789, and then only as to the States which had ratified it, is conclusively established, if authority were needed, by the decision of the supreme court in *Owings v. Speed*.²

This claim for the supreme and sovereign authority of the Federal Convention of 1787 is the more remarkable because it was a convention in which the State of Rhode Island was not represented, and in which New York was not represented when the Constitution passed by a vote of the convention. In confirmation of the views here expressed, it may be well to state that in the thirteenth of the Articles of Confederation it is provided that no alteration of these Articles be made, unless such alteration be agreed to by the Congress of the United States and be afterwards confirmed by the legislature of every State. It is obvious that the convention set at naught this provision of the Articles of Con-

¹ Const. U. S., Art. VII.

² 5 Wheat. 420.

federation when it provided that the changes in the Articles of Confederation by the new Constitution did not require the consent of Congress and did not require to be confirmed by the legislatures of every State. The reason for this is to be found in the fact already so much insisted upon, that this new Constitution was an amendment of the Articles of Confederation by the sovereign authority of the States, and not by their legislatures, which were only delegated authorities. When the sovereignty declared its purpose, that superseded the provisions of the Articles of Confederation, which said that no alteration should be made except by the consent of Congress and of the legislatures of the States. That provision could only apply as a restriction on delegated authority, but could not be a restriction placed by the delegated authority upon its sovereign delegator.

This view is stated with great strength by Mr. Madison.¹ His discussion not only negatives the theory of Mr. Burgess, but states that the Constitution adopted by that convention had its authority in "the transcendent and precious right of the people to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness;' . . . and that, as the plan to be framed and proposed was to be submitted *to the people themselves*, the disapprobation of this supreme authority would destroy it forever; its approbation blot out all antecedent errors and irregularities."

This shows clearly that the action of the Federal Convention was only the proposal of a plan to be ratified or rejected by the supreme authority of the people of the States. It was tentative, not conclusive. It proposed, but did not establish. It formulated what the States were to sanction or reject.

§ 145. After the action of the convention was made known to the States, as already stated, and while the consideration of the Constitution so proposed was before the people of the different States, there arose great anxiety

¹ The Federalist, No. XL.

about the action of the convention of New York State, which was in great doubt.

Three gentlemen of great ability, John Jay, afterwards Chief Justice of the United States, Alexander Hamilton, a member of the convention and afterwards Secretary of the Treasury, and James Madison, a member of the convention and afterwards President of the United States, published in the City of New York a series of papers, which were afterwards collected in a volume called "The Federalist," in which the action of the convention which proposed the Constitution, and the character of the instrument itself, were discussed with great power by these eminent men. These papers were written to induce the people of New York, as well as of other States, to ratify the Constitution, and in doing so explanations were made of difficulties that were suggested by its opponents, and a contemporaneous exposition was made, not only of the terms of the instrument, but of its general character, nature, objects and the mode by which it was to be finally ratified and established. This series of papers has always been regarded as of great weight upon these historic questions, because they were intended to persuade the people of the States to the ratification of the act, and thus give an implied sanction by them to the views urged upon the people by these great writers for the final sanction of the instrument itself.

We have already cited the language of Mr. Hamilton¹ in which he held and urged the importance of "laying the foundation of our national government deeper than the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of the *consent of the people*." What he meant by "the consent of the people" will be gathered from the language of Mr. Madison,² which is very clear and pertinent to this inquiry. In considering the foundation on which the government is to be established, he says:

"It appears, on one hand, that the Constitution is to be

¹The Federalist, No. XXII.

²Id., No. XXXIX.

founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but on the other, that this assent and ratification is to be given by the people, *not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong.* It is to be the assent and ratification of the several States, derived from the supreme authority in each State — the authority of the people themselves. The act, therefore, establishing the Constitution will not be a *national*, but a *federal* act.

“That it will be a federal and not a national act, as these terms are understood by the objectors, the act of the people as forming so many independent States, not as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the people of the union, nor from that of a majority of the States. It must result from the *unanimous* assent of the several states that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority, in the same manner as the majority in each State must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes, or by considering the will of the majority of the States as evidence of the will of a majority of the people of the United States. Neither of these rules has been adopted. Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *federal* and not a *national* Constitution.”

With this view Mr. Hamilton concurred in the last number of this series,¹ in which he says: “The compacts which

¹ The Federalist, No. LXXXV.

are to embrace thirteen distinct States in a common bond of amity and union must as necessarily be a compromise of as many dissimilar interests and inclinations." In advising that the Constitution should be ratified without attempting any previous amendment to it, and referring to the fact that the establishment of the Constitution depended on the ratification of only nine States, and that any subsequent amendment to the Constitution be ratified by three-fourths of the States, he says:

"It appears to me susceptible of complete demonstration that it will be far more easy to obtain subsequent than previous amendments to the Constitution. The moment an alteration is made in the present plan, it becomes, for the purpose of adoption, a new one, and must undergo a new decision of each State. To its (*i. e.*, the new alteration) complete establishment throughout the union, it will therefore require the concurrence of thirteen States. If, on the contrary, the Constitution should once be ratified by all the States as it stands, alterations in it may at any time be effected by nine States. In this view alone, the chances are as thirteen to nine¹ in favor of subsequent amendments, rather than of the original adoption of an entire system.

"This is not all. Every Constitution for the United States must inevitably consist of a great variety of particulars, in which thirteen independent States are to be accommodated in their interests or opinions of interest. . . .

"The intrinsic difficulty of governing *thirteen States*, independent of calculations upon an ordinary degree of public spirit and integrity, will, in my opinion, constantly *impose* on the national rulers the *necessity* of a spirit of accommodation to the reasonable expectations of their constituents."

These authoritative statements, emanating from the master minds of Madison and Hamilton, put at rest the theory that the Federal Convention of 1787 was the representative of

¹ This is a slight inaccuracy; he means ten, for three-fourths must ratify.

a sovereign State and constituted the thirteen States one people.

The delegates to that convention were appointed by the legislatures of the several States. They voted in convention by States. They declared that the Constitution was done in convention by the unanimous consent of the States present. The action of the convention gave no authoritative sanction to the Constitution. The convention disclaimed all power to do so by directing it to be submitted by a law of the legislature of each State to a convention of the people of that State for its separate and distinct ratification. "One people" never elected delegates to that convention. "One people" never acted in that convention. "One people" in that convention never ratified the Constitution, and the convention itself proposed to rest its establishment only upon the separate ratification of each State, and in terms declared that, without such separate ratification by each State, it could not be established in that State.

Pursuant to the action of Congress in sending a copy of the Constitution "to the several legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof," the legislature of each State passed a separate act for the election of deputies to a convention to take into consideration the proposed Constitution. Such a convention was so elected in each State. The ratifications of the Constitution by the several States may be found in the Journal of the Federal Convention.¹ These ratifications warrant, beyond controversy, the conclusion already reached, that the establishment of the Constitution was by the people of the several distinct States. At the risk of prolixity the substance of these ratifications will be given.

§ 146. *Delaware*: "We, the deputies of the people of the Delaware State, in convention met, having taken in our serious consideration the Federal Constitution proposed and agreed upon by the deputies of the United States in a general convention, . . . have approved of, assented to, rati-

¹Page 393 *et seq.*

fied and confirmed, and by these presents do, in virtue of the power and authority to us given for the purpose, for, and in behalf of ourselves and our constituents, fully, freely and entirely approve of, assent to, ratify and confirm the said Constitution."

Pennsylvania: "In the name of the people of Pennsylvania. Be it known unto all men, that we the delegates of the people of the Commonwealth of Pennsylvania, in general convention assembled, have assented to, and ratified, and by these presents do, in the name and by the authority of the same people, and for ourselves, assent to and ratify the foregoing Constitution for the United States of America."

New Jersey: "In convention of the State of New Jersey." After reciting that a convention of delegates from the following States, to wit: New Hampshire, naming all but Rhode Island, had met at Philadelphia to form a Constitution, etc., and had reported the same to Congress, and that Congress had sent the same to the legislature of the State of New Jersey, and that the legislature had passed resolutions for the meeting of a convention of representatives as delegates to a State convention to consider the said Constitution: "Now be it known, that we the delegates of the State of New Jersey, chosen by the people thereof for the purposes aforesaid, having maturely deliberated on, and considered the aforesaid proposed Constitution, do hereby, for and on the behalf of the people of the said State of New Jersey, agree to, ratify and confirm the same and every part thereof."

Connecticut: "In the name of the people of the State of Connecticut. We, the delegates of the people of said State, in general convention assembled, pursuant to an act of the legislature in October last, have assented to and ratified, and by these presents do assent to, ratify and adopt the Constitution reported by the convention of delegates in Philadelphia," etc.

Commonwealth of Massachusetts: "In Convention of the Delegates of the People of the Commonwealth of Massachusetts, February 6, 1788. The convention having impar-

tially discussed and fully considered the Constitution for the United States of America, reported to Congress by the convention of delegates from the United States of America and submitted, . . . and acknowledging with grateful hearts the goodness of the Supreme Ruler of the Universe in affording the people of the United States, in the course of His Providence, an opportunity, deliberately and peaceably, without fraud or surprise, of entering into an *explicit and solemn compact with each other* by assenting to and ratifying a new Constitution in order to form a more perfect union, . . . Do, in the name and in behalf of the people of the Commonwealth of Massachusetts, assent to and ratify the said Constitution for the United States of America." And after reciting the opinion of the convention that certain amendments would remove the fears, etc., "of many of the good people of this Commonwealth, and more effectually guard against an undue administration of the Federal government," the convention recommended the following alteration:

"That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised."

Georgia: "In convention," reciting that "the form of a Constitution for the government of the United States of America" had been agreed upon by the deputies, etc., and that the same had been transmitted to the legislatures, etc., and that the legislature of the State of Georgia had resolved: "That a convention be elected on the day of the next general election, . . . to consider the said report, letter and resolutions, and to adopt or reject any part or the whole thereof. Now know ye, that we, the delegates of the people of the State of Georgia in convention met, . . . have assented to, ratified and adopted, and by these presents do, in virtue of the powers and authorities to us given by the people of the said State for that purpose, for and in behalf of ourselves and constituents, fully and entirely assent to, ratify and adopt the said Constitution."

Maryland: "In convention of the delegates of the people of the State of Maryland. April 28, 1788. We, the delegates of the people of the State of Maryland, having fully considered the Constitution of the United States of America, reported to Congress by the convention of deputies from the United States of America, held in Philadelphia, on the 17th day of September, in the year 1787, of which the annexed is a copy, . . . do, for ourselves, and in the name and on the behalf of the people of this State, assent to and ratify the said Constitution."

State of South Carolina: "In convention of the people of the State of South Carolina by their representatives. . . . The convention having maturely considered the Constitution, or form of government, reported to Congress by the convention of delegates from the United States of America, and submitted to them by a resolution of the legislature of this State, . . . Do, in the name and behalf of the people of this State, hereby assent to, and ratify the said Constitution." The convention also declared "that no section or paragraph of the said Constitution warrants a construction that the States do not retain every power not expressly relinquished by them, and vested in the general government of the union."

State of New Hampshire: "In Convention of the Delegates of the People of the State of New Hampshire. June 21st, 1788. The convention having impartially discussed, and fully considered the Constitution for the United States of America, reported to Congress by the convention of delegates from the United States of America, . . . and acknowledging with grateful hearts the goodness of the Supreme Ruler of the Universe in affording the people of the United States, in the course of His Providence, an opportunity, deliberately and peaceably, without fraud or surprise, of entering into an explicit and solemn compact with each other, by assenting to and ratifying a new Constitution, in order to form a more perfect union, . . . Do, in the name and behalf of the people of the State of New Hamp-

shire, assent to and ratify the said Constitution for the United States of America." Then reciting as the opinion of the convention, "that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of this State, . . . The convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution: ♦

"I. That it be explicitly declared that all powers not expressly and particularly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised."

"*Virginia*, to wit: We, the delegates of the people of Virginia, duly elected in pursuance of a recommendation from the general assembly, and now met in convention, having fully and freely investigated and discussed the proceedings of the Federal Convention, and being prepared as well as the most mature deliberation hath enabled us to decide thereon — Do, in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them and at their will; that, therefore, no right of any denomination can be canceled, abridged, restrained or modified by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes; and that, among other essential rights, the liberty of conscience and of the press cannot be canceled, abridged, restrained or modified by any authority of the United States. With these impressions, with a solemn appeal to the Searcher of Hearts for the purity of our intentions, and under the conviction that whatsoever imperfections may exist in the Constitution, ought rather to be examined in the mode prescribed therein,

than to bring the Union into danger by a delay, with a hope of obtaining amendments previous to the ratifications — We, the said delegates, in the name and behalf of the people of Virginia, do, by these presents, assent to and ratify the Constitution recommended on the 17th day of September, 1787, by the Federal Convention for the government of the United States, hereby announce to all those whom *it may concern, that the said Constitution is binding upon the said people, according to an authentic copy hereto annexed, in the words following.*”

The convention then recommended to the consideration of Congress certain amendments, with a declaration or bill of rights, and then proposed, among others, the following amendment to the body of the Constitution:

“That each State in the Union shall respectively retain every power; jurisdiction and right which is not by this Constitution delegated to the Congress of the United States, or to the departments of the Federal government.”

State of New York: “We, the delegates of the people of the State of New York, duly elected and met in convention, having maturely considered the Constitution for the United States of America, agreed to on the 17th day of September, in the year 1787, by the convention assembled at Philadelphia,” made a number of declarations of rights, among which is the following: “That the powers of government may be re-assumed by the people whensoever it shall become necessary to their happiness; that every power, jurisdiction and right which is not, by the said Constitution, clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several States, or to their respective State governments to whom they may have granted the same;” and after a statement of other amendments, the convention then declared: “Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall

have been proposed to the said Constitution will receive an early and mature consideration, we, the said delegates, in the name and behalf of the people of the State of New York, do, by these presents, assent to and ratify the said Constitution."

And the convention also, "in the name and behalf of the people of the State of New York, enjoin it upon their representatives in Congress, to exert all their influence and use all reasonable means to obtain a ratification" of certain amendments therein set forth.

North Carolina and *Rhode Island* did not ratify the Constitution before it went into effect, but *North Carolina* did ratify it thereafter in the following form: "State of *North Carolina*; in Convention," reciting that the general convention at Philadelphia did recommend to the citizens of the United States a Constitution or form of government, in the following words, viz. (there reciting the whole); the convention then resolved: "That this convention, in behalf of the freemen, citizens and inhabitants of the State of *North Carolina*, do adopt and ratify the said Constitution and form of government." This ratification was on the 21st day of November, 1789.

Rhode Island, which had not appeared or taken any part in the convention at Philadelphia of 1787, on the 16th of June, 1790, ratified the Constitution in the following form: "*Rhode Island*. [The Constitution of the United States of America precedes the following ratification.] Ratification of the Constitution by the Convention of the State of *Rhode Island* and Providence Plantations. We, the delegates of the people of the State of *Rhode Island* and Providence Plantations, duly elected and met in convention, having maturely considered the Constitution for the United States of America, agreed to" . . . (a copy whereof precedes these presents); "and having also seriously and deliberately considered the present situation in this State, do declare and make known," . . . *inter alia*, "III. That the powers of government may be re-assumed by the people, when-

soever it shall become necessary to their happiness. That the rights of the States respectively to nominate and appoint all State officers, and every other power, jurisdiction and right which is not by the said Constitution clearly delegated to the Congress of the United States, or to the departments of government thereof, remain to the people of the several States, or to their respective State governments, to whom they may have granted the same," etc. And after a number of other declarations of rights, the ratification proceeds: "Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments hereafter mentioned will receive an early and mature consideration, and conformably to the fifth article of said Constitution, speedily become a part thereof—We, the said delegates, in the name and in behalf of the people of the State of Rhode Island and Providence Plantations, do by these presents assent to and ratify the said Constitution."

§ 147. The convention enjoined upon its representatives to obtain a ratification of certain amendments, among which the following amendment may be stated:

"I. The United States shall guarantee to each State its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this Constitution expressly delegated to the United States."

It may be well at this point to state that, agreeably to the declarations and urgent recommendations of the several States, the Congress of the United States proposed certain articles, with this statement: "The conventions of a number of the States, having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added," . . . resolved that certain amendments should be proposed to the Constitution, twelve in number. The first two were never ratified; the last ten were ratified by the States, and are now parts of the

Constitution and known as the "first ten amendments" thereto. The last two of these amendments are here inserted, as connected with the points now under consideration:

"Art. IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

"Art. X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

These facts as to the purpose of the convention, that the sanction and final ratification of the Constitution should be made by the people of the several States in conventions elected for that purpose, and the terms of the ratifications themselves, with the several declarations made by many conventions contemporaneous with their ratification, together with the action of Congress proposing the ninth and tenth amendments just quoted, in answer to these contemporaneous declarations of the conventions, responded to by three-fourths of the States in the ratification of these two amendments, seem to leave no doubt, as a matter of historic fact, that the Constitution derived its final and obligatory sanction as to the people of each State from the separate ratification of its own convention; and that this separate ratification was equivalent to a delegation of powers to the government of the United States by the several States, and a distinct reservation of all powers not so delegated by the Constitution, if not prohibited thereby to the States, to the State governments respectively, or to the people of the State as the sovereign and delegating authority thereof.

The terms of the declarations of the several States give this interpretation to the phrase used in the tenth amendment, "to the States respectively or to the people;" that is, to the State governments as already delegated to them, or to the people of the States as the source of sovereign powers delegated to neither.

§ 148. These conclusions are expressly confirmed by the language of the Constitution (Article VII): "The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same." The language of this article is clearly affirmative, that any State convention ratifying would establish the Constitution as to it, if nine such conventions combined in its ratification; and negatively, that if less than nine ratify, it was binding on no State, and *a fortiori* was not binding on any State whose convention refused to ratify it. This is a demonstration of the fact that the people of each State could only be bound by its own separate ratification, and that all the other States by their combined ratification could not subject a State refusing to ratify to the authority of the Constitution. But if there was any doubt about this conclusion the doubt would be removed by the crucial test to which this theory was subjected by the refusal of North Carolina and Rhode Island to ratify the Constitution.

As to whom was the Constitution established on the 4th of March, 1789? The answer is: As to the *eleven* States which had ratified it, and that as to the two States who had refused, it not only was not established, but had no authority within them or over their people. This is demonstrated by the action of Congress in reference to these two States between the 4th of March, 1789, and the dates at which each of these States subsequently ratified the Constitution.

By an act approved July 31, 1789, it was provided: "Whereas, the States of Rhode Island and Providence Plantations and North Carolina have not as yet ratified the present Constitution of the United States, by reason whereof this act does not extend to the collecting of duties within either of said two States, . . . Be it, therefore, further enacted, that all goods, wares and merchandise, not of their own growth and manufacture, which shall be imported from either of said two States of Rhode Island and Providence

Plantations, or North Carolina, into any port or place within the limits of the United States, as settled by the late treaty of peace, shall be subject to the like duties, seizures and forfeitures as goods, wares or merchandise imported from any State or country without the said limits.”¹ By this act, these two States were treated as States foreign to the Union. Why? Because not having separately ratified the Constitution, they were not in the Federal Union established thereby, nor subject to its provisions.

By an act approved September 16, 1789,² it was enacted, “That all rum, loaf sugar and chocolate, manufactured or made in the States of North Carolina, or Rhode Island and Providence Plantations, and imported or brought into the United States, shall be deemed and taken to be subject to the like duties as goods of the like kinds, imported from any foreign State, kingdom or country, are made subject to.” By the judiciary act approved September 24, 1789, district and circuit courts were established in all the eleven States, and not in the States of Rhode Island or North Carolina.

By an act approved September 16, 1789, it was enacted, “That all the privileges and advantages to which ships and vessels owned by citizens of the United States are by law entitled shall be, until the 15th day of January next, extended to the ships and vessels wholly owned by citizens of the States of North Carolina, and Rhode Island and Providence Plantations.”³ Thus a clear distinction between the privileges granted to citizens of the United States, and those which by favor were extended to the citizens of the two States named, was made. After North Carolina had ratified the Constitution, all of these provisions were extended to North Carolina and ports of entry, etc., established in that State.

By an act approved March 1, 1790, provision was made

¹ Story's United States Laws, p. 31. ³ Story's United States Laws, pp. 52, 53.

² *Id.*, p. 53.

for taking a census of the people of the United States. At that time, North Carolina having come into the Union, the census was provided for her. Rhode Island not having done so, was not mentioned in the act. After Rhode Island came into the Union, the census act was, by an act approved July 5, 1790, extended to Rhode Island. So the judicial system was extended to Rhode Island, and the tariff laws and laws for regulating commerce, etc., were extended to the same.¹

This action of the Federal government was a concession on its part that it had no power to legislate within the territory of the two States which had not ratified the Constitution, because those two States had delegated no power to Congress for that purpose. This non-action of Congress, followed by its action taken upon the ratification by each of these States of the Constitution, is indubitable evidence that the Constitution was only ordained for each of those States by its own people and for itself, and that the action of all the other States could give no authority whatever to the Constitution within the limits of those refusing. This peculiar condition of things, however, requires further elucidation.

By the Articles of Confederation, the thirteen States were bound together as a confederacy, with certain rights of intercommunication and of relationship in the league established by these articles, and one of these articles provided that they should not be amended or altered but by the action of Congress, and of the legislature of every State consenting thereto. It was therefore sought to ratify this new Constitution, which was amendatory of these articles and was intended to supersede them, by the concurrent action of not less than nine States, without regard to the dissenting action of not more than four States.

The question would then naturally arise: How could the eleven States, who had ratified the Constitution by the conventions of its respective people, supersede the obligations

¹ Story's United States Laws, vol. 2, pp. 107, 108, 110, 112.

of the Articles of Confederation between the thirteen States, when two of the States refused to ratify the new Constitution? This presents a very difficult question, and one which was very much considered by the great men of the period, among whom were the writers of "The Federalist."

It was considered by Mr. Madison with great ability as already quoted,¹ and he vindicates, upon the ground of the "transcendent and precious rights of the people to abolish or alter their governments as to them shall seem most likely to effect their safety and happiness," the action of the convention in allowing less than unanimity of the States to make the proposed change from the Articles of Confederation to the Constitution of 1789.

It is no doubt true that the Federal Constitution, adopted by the sovereign people of the several States, was paramount to the Articles of Confederation, which had been adopted only by the legislatures of the States, and that the States ratifying the Constitution by the sovereign voice of their several peoples might well claim that they were justified in seceding from the two States who refused to ratify, with whom they had been confederated only by the delegated authorities of the legislatures of the respective States.

It is very obvious, however, that the delicacy of this question gave rise to the peculiar provisions of the laws which, we have already stated, were passed prior to the ratification of North Carolina and Rhode Island, relating to duties upon articles from those States. But if North Carolina and Rhode Island had obdurately refused to adopt the Federal Constitution, the permanent policy of the government of the United States must have treated them as foreign States and the eleven as having seceded from the original confederation. And it is to this possibility of a revocation of the Articles of Confederation by the sovereign act of the people to which Mr. Hamilton referred in the statement already

¹ Federalist, No. XL; *ante*, § 144.

quoted,¹ and which made it important that the new Federal Union should be based upon the consent of the people of the States, and not upon that of their legislatures.

§ 149. All difficulty was, however, removed by the accession of the two States; the one within nine months and the other within fourteen months after the new government went into operation.

The old confederation was ratified by the legislatures of the States; the Constitution of the United States by the peoples of the respective States. The former had rested on the *delegated* power of the States; the latter was founded on the will of the *delegating* sovereignty of each State. The one was a confederacy by State governments; the other is a confederacy by State peoples. The former is made by legislatures; the latter by the sovereign Bodies-politic of the States of the Union.

All the historic facts above recited show that the Articles of Confederation were the first Federal Constitution between the States; that they were so named by all the States and by Congress in recommending the Federal Convention of 1787 to revise and amend them; that the Philadelphia convention of 1787 was recommended by Congress "for the sole and express purpose of revising said Articles so as to make the Federal Constitution adequate for the exigencies of the Union;" that the Philadelphia convention did revise that first Constitution, and that the Constitution of the United States is the revision of the "Federal Constitution" for the United States of America. It is the same organism — the same union between States — based upon diverse foundations; the one on the *delegated*, the other on the *delegating* authority of the States; the same organism, with increased power. and reform in the machinery of its operations, but the same United States of America, under the Constitution of the United States, as they had been under the Articles of Confederation.

That this is true is established by the authority of the

¹The Federalist, No. XXII.

Constitution itself. In Article VI it is provided: "All debts contracted, and engagements entered into, before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation; . . . and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

It has been sought to overthrow these conclusions by the language of the preamble of the Constitution of the United States, which is in these words: "We, the people of the United States, in order to form a more perfect union, establish justice, and assure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and posterity, do ordain and establish this Constitution for the United States of America." Upon the basis of this language the question is asked: Does it not say, "We, the people of the United States?" Does it say, "We, the people of these several States, do ordain and establish?" Does not the Constitution, then, itself declare that it is ordained by one people — "the people of the United States," one civil Body-politic,—and not by the peoples of the several States, as distinct and independent Bodies-politic?

This view is that maintained by Judge Story in his "Commentaries on the Constitution."¹ He says: "The people do ordain and establish — not contract and stipulate with each other. The people of the United States — not the distinct people of a particular State with the people of other States. The people ordain and establish a Constitution — not a confederation." He cites for this the language of his own opinion in *Martin v. Hunter*,² in which he says: "The Constitution was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares; 'by the people of the United States.'" He insists that it forms a "Constitution, not a Confederation."

¹ Vol. 1, § 352.

² 1 Wheat. 304, 324.

This view is plausible, but a critical consideration of it will show it is unsound.

Two propositions may be laid down:

First. These words are descriptive of the party or parties who do the deed — who ordain and establish the Constitution; *not* of those who do not do the deed and are not party or parties to it.

Second. They describe the party or parties to the act; *not* a party who shall exist by virtue of or as a result of the act.

If, then, these words describe those who ordained the Constitution, we may ascertain their meaning by learning what is a fact. It may be admitted that the words are susceptible of two meanings: one, as insisted upon by Judge Story, that the Constitution was ordained by the people of the United States as one civil Body-politic — as one people; or second, that it was the people of the United States, because it was the people of each State acting separately, and of all in combination.

The non-use at that day of the plural form of the noun “people” made it unusual to have said, “We, the peoples of the United States,” and more proper to have said, “We, the people of the United States,” when it meant the combined act of the people of the several States. When in ordinary language we speak of the people of Europe, we surely should not be held to mean that they were one civil Body-politic.

The true meaning, therefore, of the words will be obtained by an answer to the inquiry, who were the parties or the party who ordained the Constitution? Was it the people of the United States as one people — as one civil Body-politic? If so, When? Where? How? So far from it, we have seen that Congress, the only organ of all the States, had nothing to do with its adoption, and was expressly and purposely shut out from all action upon it, except as the medium of sending it to the true ordaining authority,— that is, to the legislature of each State, who were to submit it to a convention of the people of each State to be by it ratified for the State.

To interpret the preamble, then, as meaning "the one people of the United States as one civil Body-politic," is to interpret it as meaning a historic falsehood, and one which could deceive nobody at the date of its utterance. On the contrary, it has been shown that for the people of each State it was ratified by the convention of that people as a separate and distinct Body-politic; that without that ratification by such convention it had no force or authority upon the people of that State.

It was proposed by a convention composed of delegates elected by the legislatures of the several States,—not of deputies elected by all the States, as one civil Body-politic in any form. The States voted as co-equal States in the Federal Convention. The Constitution itself declared that it was "done in convention by the unanimous consent of the States present." It was signed by the deputies as deputies of these several States. The people of each State in convention ratified it for itself alone; was bound only by its own act, and could bind no other State. It went into operation only as to the eleven States who ratified it, and did not bind two who respectively refused to ratify it. That is, the United States, as a unit embracing thirteen States, could not, though eleven States consented, bind two who dissented. The Constitution in its terms declared that "the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution,"—not over all the thirteen States, but "*between* the States so ratifying the same." Thus the Constitution itself provided that it might be established for only nine of the thirteen United States, and might leave four out of the Union established thereby unbound by the Constitution because they severally refused to ratify it.

We have shown that, as a matter of fact, two did refuse to ratify it, and were treated by the government, established by the Constitution for the eleven States ratifying the Constitution, as foreign States to the Union.

If, therefore, the words, "we, the people of the United

States," mean "we, the people of the United States, as one civil Body-politic, do ordain the Constitution for its thirteen fractional parts," it supposes what history says was a falsehood; but if it means that "we, the people of each State of this Union, acting for itself and all others agreeing to its ratification, ordain the Constitution," it speaks the truth.

In determining, therefore, the meaning of the equivocal words, we are placed in the dilemma of accepting an interpretation which history falsifies or which history confirms. In this dilemma, can we hesitate to accept that which is consistent with historic facts, rather than that which historic facts condemn as false?

§ 150. In the Virginia convention, called by the legislature of that State to consider the Constitution, Patrick Henry, who was greatly alarmed at the evil consequences which would result from the ratification of the Constitution, which, with wonderful prevision, he pointed out, and which he desired so to present as to prevent ratification, sounded the note of alarm upon the use of these words in the preamble.

He said:¹ "That this is a consolidated government is demonstrably clear; . . . what right had they to say, *We, the People?* . . . who authorized them to speak the language of *We, the People*, instead of *We, the States?* States are the characteristic and the soul of a confederation. If the States be not the agents of this compact, it must be one great consolidated national government of the people of all the States."

Again he said: "Have they said *We, the States?* Have they made a proposal of a compact between the States? If they had, this would be a confederation; it is otherwise most clearly a consolidated government. The question turns, Sir, on that poor little thing — the expression *We, the people*, instead of the States of America."²

¹Debates of the Convention of Virginia, p. 28. ²Id., p. 42.

This alarm sounded by the prophetic orator, "who had been elected as a deputy from Virginia to the Federal Convention, but declined to go," was answered by several gentlemen in the convention. Governor Randolph, a prominent member of the convention, said:¹ "The gentleman then proceeds, and inquires, why we assumed the language of 'We, the People?' I ask why not? The government is for the people; and the misfortune was, that the people had no agency in the government before." In this remark he obviously refers to the fact that the confederation had been adopted by the legislatures of the States, while this Constitution was to be ratified by the people of the States.

Judge Edmund Pendleton, president of the convention, said:² "But an objection is made to the form: the expression We, the people, is thought improper. Permit me to ask the gentleman who made this objection, who but the people can delegate powers? Who but the people have a right to form government? . . . If the objection be, that the union ought to be not of the people, but of the State governments, then I think the choice of the former very happy and proper. What have the State governments to do with it? Were they to determine, the people would not, in that case, be the judges upon what terms it was adopted."

General Henry Lee also said, in reference to the use of the expression, "We, the people," and not "We, the States:"³ "This expression was introduced into that paper with great propriety. This system is submitted to the people for their consideration, because on them it is to operate, if adopted. It is not binding on the people until it becomes their act. It is now submitted to the people of Virginia. If we do not adopt it, it will be always null and void as to us. Suppose it was found proper for our adoption, in becoming the government of the people of Virginia, by what style should

¹ Debates of the Convention of Virginia, p. 32.

² Id., p. 38.

³ Id., p. 41.

it be done? Ought we not to make use of the name of the people? No other style would be proper."

Again he said, referring to a statement made by Mr. Madison:¹ "If this were a consolidated government, ought it not to be ratified by a majority of the people as individuals, and not as States? Suppose Virginia, Connecticut, Massachusetts and Pennsylvania had ratified it; these four States, being a majority of the people of America, would, by their adoption, have made it binding on all the States, had this been a consolidated government. But it is only the government of those seven States who have adopted it." (Seven States only had ratified it up to that date.) "If the honorable gentleman will attend to this, we shall hear no more of consolidation."

The clear and logical statement of James Madison, who was a member of the Federal Convention, and more than any other man may be regarded as its originator, is conclusive on this point. He said:² "Who are parties to it? The people—but not the people as composing one great body—but the people as composing thirteen sovereignties; were it, as the gentleman asserts, a consolidated government, the assent of a majority of the people would be sufficient for its establishment, and, as a majority have adopted it already, the remaining States would be bound by the act of the majority, even if they unanimously reprobated it; were it such a government as it is suggested, it would be now binding on the people of this State, without having had the privilege of deliberating upon it; but, sir, no State is bound by it, as it is, without its own consent. Should all the States adopt it, it will then be a government established by the thirteen States of America, not through the intervention of the legislatures, but by the people at large. In this particular respect the distinction between the existing and the proposed governments is very material. The existing system has been derived from the dependent derivative authority

¹ Debates of the Convention of Virginia, p. 135. ² Id., p. 76.

of the legislatures of the States; whereas this is derived from the superior power of the people."

This language of Mr. Madison is in accord with the statement made by him in the thirty-ninth number of "The Federalist," already quoted.¹ He says: "This assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States derived from the supreme authority in each State—the authority of the people themselves. . . . The act of the people as forming so many independent States—not as forming one aggregate nation. . . . It is to result neither from the decision of the *majority* of the people of the Union, nor from that of the *majority* of the States. It must result from the *unanimous* assent of the several States that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority. . . . Each State, in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act."

Chief Justice Marshall, who was a member of the Virginia convention which ratified the Constitution, and who heard the objections made to these words by Patrick Henry, and the full answer to him by Madison, and who voted for the ratification of the Constitution, in *McCulloch v. Maryland*² said:

"The convention which framed the Constitution was, indeed, elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation or pretensions to it. It was reported to the then existing Congress of the United States, with a request

¹ § 144.

² 4 Wheat. 403.

that it might 'be submitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the convention, by Congress and by the State legislatures the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively and wisely on such a subject, by assembling in convention. It is true, they assembled in their several States; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves or become the measures of the State governments.

"From these conventions the Constitution derived its whole authority. The government proceeds directly from the people, is 'ordained and established' in the name of the people, and is declared to be ordained 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.' The assent of the States, in their sovereign capacity, is implied in calling a convention and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it, and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The Constitution, when thus adopted, was of complete obligation and bound the State sovereignties."

It thus appears that contemporaneous with the objections to these words, and to the possible construction of them according to the theory of Judge Story, there was the emphatic condemnation of such a construction by the authoritative declaration of Mr. Madison, both in the "Federalist" and

on the floor of the Virginia convention, as well as by those of a number of eminent men who voted to ratify the Constitution with a denial of the validity of the objection, and that all this was confirmed by the judgment of Chief Justice Marshall, an actor in the Virginia convention of 1788, in an opinion in 1819, in which Judge Story concurred.

§ 151. But a little care in investigating the journals of their convention will put this objection in a clearer light.

The preamble declares: "We, the people of the United States, . . . do ordain and establish this Constitution for the United States of America." Let us seek the meaning of these terms, "United States," and "United States of America." It should be remembered that the deputies to this convention which used these terms were from States who were then united under the Articles of Confederation. The best source for the meaning of the terms used by them will be the Articles of Confederation, which clearly define their meaning. The first of the Articles of Confederation declares, "the style of this confederacy shall be *the United States of America*." When asked, What confederacy? the Articles answer: "The confederation and perpetual union between the States of New Hampshire," etc., naming all. Then "The United States of America" means, by this authentic definition, "the confederacy between the States of New Hampshire," etc.

If, then, we substitute this meaning in the preamble to the Constitution, it will read thus: "We, the *people* of the confederacy between the States of New Hampshire, . . . do ordain this Constitution for the confederacy between the States of New Hampshire," etc. That is, "We, the *people*,"—not the legislatures,— "of the confederated states of New Hampshire, etc., known as the United States of America,—not as one civil Body-politic, but as a league,—an alliance,—a confederation,—a union between many Bodies-politic,—do ordain this Constitution for this confederacy between the States. So that by taking the meaning of the terms as they

were in the minds of those who used them, defined by an authentic document under which they were then living, the use of the word "people" in the preamble, instead of the word "States," is shown to have been to express that fundamental distinction to which we have often adverted between the basis upon which the then confederation rested from the basis upon which the new Constitution was to rest: the distinction between the *delegated* and the *delegating* authority. This is more obvious from a further fact. The preamble declares that the Constitution was ordained "in order to form a more perfect union." More perfect than what? Clearly, than the perpetual union now existing. But that was a confederation. The preamble does not say it was intended by the Constitution to change the principle of the existing union into a consolidated civil Body-politic, but to form a more perfect union or confederation between the United States than then existed: more perfect in remedying the two vices of the confederation by making the government created by the Constitution act immediately on men, and not mediately through States, and more perfect in resting on the will of the people of the several States than on the legislatures of the several States.¹

§ 152. That this is the key to the construction of these words is evident from many facts in the debates of the convention.

In the consideration of the "Virginia plan," as it was called, the fifteenth resolution, recommending conventions under appointment of the people to ratify the new Constitution,² Mr. Madison spoke of the defect of the Articles of Confederation in resting only upon the legislative sanction, and that it was indispensable that the new Constitution should be ratified by the supreme authority of the people. That resolution was afterwards adopted.³ If we are asked why the present form was adopted, and not one which named

¹ See in accord, *Texas v. White*, per Chase, C. J., 7 Wall. 707.

² *Madison Papers*, pp. 734-35, 795, 796.

³ *Id.*, pp. 846, 861, 1184-85.

the separate States, a short history of the proceedings on this point will be instructive.

In the first draft of the Constitution, proposed by Mr. Charles Pinckney, of South Carolina, and which as a skeleton outline was entitled to be recorded as the original framework of the Constitution, the preamble read: "Plan of a Federal Constitution. We, the people of the States of New Hampshire, Massachusetts, Rhode Island (naming all), do declare and establish the following Constitution."¹ On the 6th of August Mr. Rutledge made a report from the committee of detail on the Constitution, which had up to that time been discussed and agreed on. The preamble was the same precisely as that proposed in the Pinckney plan.² On the 7th of August, 1787, the preamble of the report was agreed to *nem. con.*³ After debating the plan as reported by the committee of detail for several weeks, a committee was appointed to revise the style of and arrange the articles which had been agreed to by the house. On that committee were Dr. Johnson, Mr. Hamilton, Mr. Gouverneur Morris, Mr. Madison and Mr. King.⁴ We have evidence that Gouverneur Morris was the member who reported a digest of the plan on the 12th of September. The report contained the preamble in the form in which it now appears in the Constitution. It does not appear that question of any kind was raised as to this change in the form of the preamble.

We are left, then, to speculate upon the reason of the change which was made. The first form, as we have seen, was adopted by a vote of the convention *nem. con.* Did the change in the preamble mean a substantial change of its sense? If it did, then we have the remarkable fact presented, that a form adopted without objection on the 6th of August was radically changed a little more than a month afterwards without objection. This is so incredible that we

¹ Id., p. 735.

² Id., p. 1226.

³ Id., p. 1243.

⁴ Id., p. 1532.

are driven to the conclusion that the members of the convention saw only a change in style in the form reported on the 12th of September, and not a change in sense or meaning from that which was agreed to *nem. con.* on the 6th of August.

The question still remains: Why, then, was the change made? Several reasons may be assigned.

(a) Rhode Island was named in the first draft as one of the States ordaining the Constitution, but she was not represented in the convention. It might well occur to the critical draftsman of the preamble reported by the committee on style on the 12th of September, that it assumed too much to say that the people of Rhode Island united to ordain a Constitution when she refused to be present in the convention which was formulating it for a reference to the States for ratification. The change is significant as evidence that she could not be put into the Constitution as bound by it unless she were self-bound.

(b) By Article VII of the Constitution of the United States the Constitution could only be established between nine States who should ratify it; the four, or less number, who might refuse to ratify it, would not be bound by it, which four, or less number, who might refuse, could not be known until their action. To name any such possibly refusing States in the preamble as ordaining it by its people would be an anomaly which an adroit draftsman of the style of the preamble would avoid by omitting to name any. Therefore, he used a form of expression which would indicate the States who were to be united by their several ratifications of the Constitution, without their being named at all.

(c). But by the Constitution new States were to be admitted into the union—new States then entirely unknown, and many even at this day unknown, who may become members of the Federal Union. How awkward to name any States in the preamble as parties to the Constitution without naming all who were finally to become parties thereto and members of the union!

These reasons would suggest to the draftsmen on style, that, as the words "United States" meant States united in confederation under the existing Articles of Confederation, the use of these words in the preamble to the new Constitution would embrace all who were then united, or might thereafter unite, in the ratification of this Constitution. The words "United States" were imported from the old articles into the new Constitution, and by article VI of this Constitution it was the same confederation, responsible under the Constitution for all debts, engagements and treaties made by the United States under the confederation. The use of this general term, therefore, would be the most appropriate, as embracing all then, or thereafter to become, members of the confederation.

§ 153. Other evidence which really settles this question may be presented.

When the Federal Convention met at Philadelphia in May, 1787, what was the political status and relation of these States to each other? The cluster of young commonwealths in confederation, induced by the common peril to their liberty due to the action of the mother country, has, upon their own authentic declaration, given the answer to this question. The Articles of Confederation established March 1, 1781, is the most authentic source from which we can derive the actual relations between the States.

By the second of the Articles of Confederation each of these States retained its sovereignty, freedom and independence. The United States of America had none, and only such powers, jurisdiction and right as by that confederation were expressly delegated to the United States in Congress assembled. The sovereignty, freedom and independence of each State was absolutely retained, and also every power, jurisdiction and right not so expressly delegated to the United States in Congress assembled.

The deputies to the Federal Convention at Philadelphia, as we have seen, had authority delegated to them by their respective legislatures to revise the Articles of Confederation

so as to make the Federal Constitution adequate to the exigencies of the union. This was the extent of the powers of the delegates of the States to that convention. The convention, therefore, had no authority to surrender the freedom and independence of each State so absolutely retained by the terms of the second of the Articles of Confederation. The convention had no power to merge the sovereignty, freedom and independence of the several States into one sovereignty of one people of the United States.

The people of the United States, as one sovereign people, not having been previously established by the sovereign States themselves, had no existence, and therefore could not ordain a Constitution for the States. For the people of the United States, as one sovereignty, to ordain a Constitution, required the previous ordainment into such sovereignty of the people of the United States by an authoritative merger of the sovereignty, freedom and independence of the several States. That could only be done by the sovereign States themselves, and it follows as an inevitable conclusion, that that which never had been created could not ordain a Constitution for the States.

The only people which then existed that could, as a sovereign power, ordain a Constitution for the States, were the separate peoples of the States, who retained absolutely their sovereignty, freedom and independence. It is therefore absurd to say that the words "we, the people of the United States," in the preamble to the Constitution, could mean the people of the United States as one sovereignty, which had no existence at that time, and could mean any other than the people of each State as a complete sovereign State, by reason of the retention of its sovereignty, freedom and independence under the second of the Articles of Confederation.

§ 154. A reference to the provisions of the Constitution will sustain this view.

(a) The seventh article of the Constitution, so often referred to, declares "that the ratification of the conventions

of nine States shall be sufficient for the establishment of this Constitution *between* the States so ratifying the same." The preposition there used is indicative of compact between the ratifying States, and shows that when established it was a bond between the States as still existent parties to the compact between them.

In article IV, section 11, clause 2, it is provided that a person charged in any State with treason, etc., fleeing from justice into another, shall be extradited upon the demand of the State offended upon the asylum State. This shows that treason is a crime against a State; but treason is a crime against sovereignty. Hence the continued existence of a State as a sovereignty against which treason is a possible crime is fully recognized in that clause, and the demand for extradition by the one State upon the other is such a demand between independent sovereigns as not to be the subject of judicial action, but only dependent upon the sovereign will of the asylum State upon which the demand is made.¹

(b) "Treason against the United States shall consist only in levying war against *them* or in adhering to *their* enemies." Treason, therefore, is held to be a crime against the individual States and against the States in union,—against the States in union, not as one civil Body-politic, but as the multiple of Bodies-politic "against *them* and adhering to *their* enemies." The unit of the United States as a sovereignty against which treason may be committed is therefore negatived, and treason against the multiple of the sovereign units is affirmed.²

(c) The United States "shall protect each of them against invasion." Each one of the multiple of units. The separateness of each is as palpably asserted as the union of the many.³

(d) "No new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States,

¹ Kentucky v. Dennison, 24 How. 66.

² Const. U. S., Art. III, sec. 3.

³ Id., Art. IV, sec. 4.

without the consent of the legislatures of the States concerned, as well as of the Congress."¹ This secures the territorial integrity of every State against all external power without its own consent.

(e) The United States government can only have exclusive jurisdiction over a seat of government for itself, or over forts, etc., with the consent of the State within which it may be established.² This fixes the indefeasible domain of each State within its own borders, except by its own consent.

(f) The provision for faith and credit as to public acts and records of any State within every other is matter of compact, and so as to the privileges and immunities of citizens of each State in every other State.³ This shows that, except for the compacted obligation, the distinctness of the States under the Federal Constitution would have excluded any such faith and credit in the one class of cases, or any such privileges and immunities in the other. If the United States were one sovereignty, of which the States were fractions, this would have existed without such provision; but as the United States constituted only a union between sovereign States, it required compact to establish these rights, privileges and immunities.

(g) It is true that the Constitution⁴ puts a number of proprietary limits upon the powers of the States, but these limitations are, as intimated in the cases just referred to, clear evidence that, but for the express limitations, the powers prohibited would have been possessed by the States. These powers so prohibited are in the highest degree evidences of independent sovereignty. In brief, they include the treaty-making power, the power to confederate, the power to make war, etc. The unquestioned existence of these powers in the States, except for this express prohibition, is conclusive evidence that the States as members of the Union possessed all their original sovereignty.

¹ *Id.*, Art. IV, sec. 3, clause 1.

³ *Id.*, Art. IV, secs. 1, 2.

² *Id.*, Art. I, sec. 8, clause 16.

⁴ *Id.*, Art. I, sec. 10

(*h*) That the United States are not a unit, but a multiple of units, the following language of the Constitution gives indubitable proof:

(1) As to treason, see *ante*.¹ Levying war against *them*; — adhering to *their* enemies.

(2) As to persons “holding any office of profit or trust under *them*,” — not under a unit, but under the multiple of units.²

(3) Treaties made under *their* authority; — the multiple, not the unit.³

(4) The eleventh amendment uses the phrase “against *one* of the United States,” — that is, against a unit of the multiple of units.

(5) The thirteenth amendment, adopted since the war, uses the phrase, “any place subject to *their* jurisdiction,” — that is, of the United States, the multiple of units.

(6) The United States “shall protect *each of them* against invasion,” — the multiple protects each unit of the multiple.⁴

(*i*) The only name by which the union is called in the Constitution is “The United States.” Power is delegated to a Congress of “the United States,” — to the President “of the United States.” The judicial power is that of “The United States.”

(*j*) After the Constitution was ratified and had been in operation for several years, the tenth amendment was ratified as a part thereof. Its language is very clear and distinct and has great pertinency to the question under consideration. It declares: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

§ 155. Upon this amendment these remarks may be made:

First. The United States possess powers by delegation from the Constitution. Except those so delegated, the

¹Page 302.

²Const. U. S., Art. I, sec. 9, clause 7. ⁴Id., Art. IV, sec. 4. See in accord, Field, J., in *Stanley v. Schwalby*, 147 U. S. 508, 520, 521.

³Id., Art. III, sec. 2, clause 1.

United States have no power. They have none by original or inherent right, but only as delegated by grant.

Second. The States have by reservation all powers not so delegated to the United States, unless prohibited to the States, so that their possession of power by general reservation is inherent and original, and would continue except for express prohibition. Power exists in the United States by virtue of delegation only. Power exists in the States as inherent by reservation, unless prohibited. The United States hold by grant,—the States are divested of power by prohibition or by grant to the United States. This shows that the States respectively are the original sources of power, of which they may be divested upon their own grant, or by self-prohibition, and that the United States have no powers which they do not derive by grant.

Third. “Reserved to the States respectively or to the people.” This means to the State governments respectively or to the people of each State. That this is the meaning of this clause, which, though changed in phraseology, was really suggested by several of the States in connection with their ratifications, will be made apparent from the language of the convention of New York State in their declaration of rights. That convention declared “that every power, jurisdiction and right which is not by the said Constitution clearly delegated to the Congress of the United States or the departments of government thereof *remains to the people of the several States*, or to their respective State governments to whom they may have granted the same.”¹

Rhode Island used the same terms.² Massachusetts adopted this form: “That all powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised.”³ South Carolina declared against any construction “that the States did not retain every power not expressly relinquished by them and vested in the gen-

¹ Journal of Federal Convention,
Supp., p. 427.

² Id., p. 456.

³ Id., p. 402.

eral government of the union.”¹ New Hampshire follows the language of Massachusetts.² Virginia declared “that each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States, or to the departments of the Federal government.”³ North Carolina declared substantially in the same language as Virginia.⁴

As each State had already vested in its State government certain powers, and reserved to itself as a sovereign Body-politic others not so vested, it was proper, when the new Constitution granted powers to the United States which had previously been vested in the State governments, that the form proposed and the amendment adopted should contain the two ideas of reservation of powers not delegated to the United States and not prohibited to the States, to the State governments in whom some of such powers had been previously invested, or to the people of each State as the reservoir of ungranted power.

Fourth. The words “are reserved,”—not shall be reserved hereafter, but are now reserved,—should be noted. This is a declaration in accordance with the views of the States proposing it, that even the prior ratification of the Constitution involved this essential reservation of power to the State governments respectively, or to the people of the States; and furthermore, that the State thus continued after the government had gone into operation as the reservoir—the sovereign reservoir—of ungranted powers.

If then the question be asked: Have the United States this or that power? this question is resolved by asking: Has it been delegated to the United States by the Constitution? If not, they have no such power. If the question is as to State power, it is resolved, not by asking has it been granted to the States by the Constitution, but has it been delegated to the United States, or has it been prohibited to the States?

¹ Id., p. 411.

² Id., p. 413.

³ Id., p. 421.

⁴ Id., p. 444.

If neither, then it is held by reservation as an original power of the sovereign State.

§ 156. The eleventh amendment is also instructive in this connection.

In *Chisholm v. Georgia*¹ the Supreme Court decided that a citizen of South Carolina could sue the State of Georgia under the Constitution.² This decision, despite the reasoning of Hamilton,³ created great alarm throughout the union.⁴

The States adopted the eleventh amendment in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." The peculiarity of the language of this amendment must be noted. It does not say that the power to sue a State, asserted in the decision, shall no longer exist, but it declares, "the judicial power *shall not be construed* to extend to" such a case. It is a mandatory construction of the original Constitution by the States to the judiciary of the United States not to construe the original Constitution as they had done. A command by the delegators of power — the still existent parties to the original compact — that the judiciary should not construe the Constitution as it had done. The States did not amend or change the Constitution, but gave it a mandatory interpretation.

The Supreme Court of the United States obeyed the voice of the States in the amendment, and swept from its docket every pending suit by a citizen against a State, under the command of the States, who thus claimed not only to have ordained the Constitution, but by ordainment to interpret it.

Again: A number of propositions which looked to congressional supervision of State action under its reserved power were made in the convention.

A proposition was made to give to the legislature of the

¹ 2 Dall. 419.

² Art. III, sec. 2.

³ The Federalist, No. LXXXI.

⁴ Argument and opinion, In re Ayers, 123 U. S. 462-64.

United States the power "to negative all laws passed by the several States interfering, in the opinion of the legislature, with the general interest and harmony of the union." John Rutledge said: "If nothing else, this alone would damn, and ought to damn, the Constitution." Ellsworth and others sustained his view. The proposal was withdrawn.¹

It was proposed to call forth the force of the union against a delinquent State. Mr. Madison said: "Such an ingredient provides for the destruction of the union. The use of force would look more like a declaration of war, and would dissolve all previous compacts." The proposition was postponed *nem. con.*

Mr. Hamilton proposed that Congress should have power to pass all laws whatsoever, subject to the veto of the President; to appoint the executive of each State, with the veto power in the case of all their laws; and that the United States should have absolute control of the militia, with the appointment of all its officers. All these proposals failed.²

Some stress has been laid upon the fact that, in the original proposition of Governor Randolph, it was proposed to constitute a national legislature, a national executive, and a national judiciary, and of late years much emphasis has been laid upon the application of the words "nation" and "national" government to the union and to the government of the United States.³

It may be well to point out why these words "nation" and "national" are not to be found in the Constitution as adopted. At an early period of the debate, the committee of the whole reported this resolution: "That a national government ought to be established."⁴ On the 20th of June Mr. Ellsworth moved to amend it so as to read: "That the government of the United States ought to consist," etc. This motion was agreed to *nem. con.*, "which dropped," as Mr. Ellsworth observed, "the word 'national' and retained

¹ Madison Papers, pp. 1409-1412.

³ Id., pp. 731-35.

² Id., pp. 890-92.

⁴ Id., pp. 858, 859.

the proper title 'the United States.'"¹ Votes were taken by which the word "national" was struck out wherever it occurred in the report of the committee of the whole.² But it appears that the word "national" in the draft of the Constitution reported August 6th was stricken out of every clause in the Constitution reported and never re-appeared.³ So that the words "nation" and "national" as applicable to the Federal system and government are not to be found in the Constitution.

The celebrated Gouverneur Morris, the leader of centralism in the convention, said he feared "the States had many representatives on that floor, but America few," and that he was "in favor of another general convention, that will have the firmness to provide a vigorous government, which we are afraid to do." He proposed such a convention, but obtained no second to his proposal. In a letter to Lewis Sturges in 1814, Mr. Morris, whose hand had penned the Constitution as it was adopted, said: "The Constitution was a *compact*, not between solitary individuals, but between political societies; the people, not of America, but of the United States, each enjoying sovereign power, and of course equal rights." The same view is expressed by the authors of the Federalist. Thus, Mr. Madison,⁴ referring to the suggestions of Montesquieu in favor of a confederate republic as the expedient for extending the sphere of popular government and reconciling the advantages of monarchy with those of republicanism, quotes from him as follows:

"This form of government is a convention by which several smaller *States* agree to become members of a larger *one*, which they intend to form. It is a kind of assemblage of societies that constitute a new one, capable of increasing by means of new associations, till they arrive to such a degree

¹ Id., pp. 908, 909; Journal of Convention, pp. 138, 139.

² Journal of Federal Convention, pp. 145, 146.

³ Id., p. 215.

⁴ The Federalist, No. IX.

of power as to be able to provide for the security of the united body. . . .

“Should a popular insurrection happen in one of the confederate States, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound. The State may be destroyed on one side, and not on the other; the confederacy may be dissolved, *and the confederates preserve their sovereignty*”

“As this government is composed of small republics, it enjoys the internal happiness of each, and with respect to its external situation it is possessed, by means of the association, of all the advantages of large monarchies.”

Mr. Madison then adds:

“The definition of a *confederate republic* seems simply to be ‘an assemblage of societies,’ or an association of two or more States into one State. The extent, modifications and objects of the Federal authority are mere matters of discretion. So long as the separate organization of the members be not abolished, so long as it exists by a constitutional necessity for local purposes, though it should be in perfect subordination to the general authority of the union, it would still be in fact and in theory an association of States, or a confederacy. The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive, and very important, portions of the sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a Federal government.”

In the twenty-eighth number of the *Federalist*, Mr. Hamilton argues that, if the representatives of the people in the general government betray their constituents, no resource would be left but in the existence of the original right of self-defense, paramount to all forms of government—that this could be exerted better against the Federal rulers than those of a State. “In a single State, if the persons intrusted

with supreme power become usurpers," . . . the people in their counties and cities "having no distinct government in each can take no regular measures for defense. The citizens must rush tumultuously to arms, without concert, without system, without resource," etc. "But in a *confederacy*, the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will, at all times, stand ready to check the usurpations of the State governments; and these will have the same disposition toward the general government. . . . If their rights are invaded by either, they (the people) can make use of the other as the instrument of redress." . . . "It may safely be received as an axiom in our political system that the State governments will, in all *possible contingencies*, afford *complete security against invasions of the public liberty by the national authority*. . . . The legislatures will have better means for information" (than the people); "they can discover the danger at a distance; and possessing *all the organs of civil power* and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine *all the resources* of the *community*. They can readily communicate with *each other in the different States*, and *unite their common forces* for the protection of their *common liberty*. . . . If the Federal army should be able to quell the resistance of one State, the distant States would have it in their power to make head with fresh forces." And then, after stating that there would not be for a long time a large Federal army, he adds: "When will the time arrive that the Federal government can raise and maintain an army capable of erecting a despotism over the great body of the people of an immense empire, who are in a situation, through the medium of their State governments, to take measures for their own defense, with all the celerity, regularity and system of *independent nations*? The apprehension may be considered as a disease for which there can be found no cure in the resources of argument and reasoning."

The same views are pressed by Mr. Madison in the forty-sixth number of the *Federalist*. "But ambitious encroachments of the Federal government on the authority of the State governments would not excite the opposition of a single State or of a few States only; they would be signals of general alarm. Every government would espouse the common cause. Plans of resistance would be concerted. The same combination, in short, would result from an apprehension of the Federal as was produced by the dread of a foreign yoke," etc.

In the powerful statement of Mr. Hamilton, written to induce the ratification of the Constitution, it will be seen that he calls the government "a Federal government," and the proposed union "a confederacy." That under the proposed Constitution the States, as independent nations with all the organs of civil power and all the resources of the community at hand, could, and should, organize armies to make head against the power of the Federal government, and fight with success against the Federal usurpers of power and the destroyers of the peoples' liberties. According to this view, so far from the union presenting consolidated oneness, it is a multiple of many independent commonwealths, each one of which, by the Constitution, is left with the political power and the physical resources to defend the liberties of the people of each against the Federal despotism.

§ 157. In the eighty-first number of the *Federalist* Mr. Hamilton discusses the objection made to the Constitution, that a State might be sued by a citizen of another State upon its obligations, and held that this idea was entirely unfounded. His reasons against it, although the decision in *Chisholm v. Georgia* sustained the jurisdiction (which was taken away, as we have seen, by the eleventh amendment), are very striking upon the point we are considering. He says: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of man-

kind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.

. . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State; and to ascribe to the Federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

In this passage Mr. Hamilton asserts such continuance of independence and sovereignty in the State as that it cannot be sued except by its own consent, and that its consent in the Constitution of the United States had not yet been given to such suit. We have seen that this view was not held in the case of *Chisholm v. Georgia*, but that the States themselves, by the eleventh amendment, declared that the judicial power was not to be construed to extend to any such case. So that the States vindicated their non-suability as sovereign commonwealths by the amendment which denied to the judicial power such a construction of the original terms of the Constitution.

§ 158. We have sufficiently, perhaps, indicated that the continuing existence of the States as members of a confederate union is established by the mutual stipulations of the States as to faith, credit, etc., in their several regards; as to the privileges of citizenship; as to extradition of criminals, slaves, etc. These are terms of a compact between States. The provisions, also, by which the States inhibited the exercise of certain powers by each State are stipulations of

compact, and the provision by which the United States guarantees a republican form of government to each State is a stipulation *inter se* that each shall retain that form, and that all shall assure it to the people of each.

The language of a great lawyer, Rufus Choate, of Massachusetts, in an address July 4, 1858, finely illustrates this proposition. He says: "I have sometimes thought that the States in our system may be compared to the *primordial particles* of matter, indivisible, indestructible, impenetrable, whose natural condition is to repel each other, or, at best, to exist in their own independent identity, while the Union is an *artificial aggregation* of such particles." In other words, the States are natural and original; the Union is artificial and derivative.

But a further striking illustration may be derived from physical science. By chemical affinity a new substance is created by the union of several distinct substances. A mechanical union of these parts makes a mixture in which the substances, though combined in one mass, are unchanged in character and no new substance is formed. They are mixed, not merged. Thus hydrogen and oxygen may be mechanically mixed forever and the substance of neither be changed; but the electric spark will destroy each and create the dew-drop diverse from either, by the union of both. This mechanical and chemical union of substances illustrates very well the German distinction between *staaten-bund* (a bond of states) and *bundes-staat* (a bonded state).

The confederacy is *staaten-bund*, in which the States exist as the separate Bodies-politic ("primordial particles of matter"), and such a case as the creation of the new kingdom of Great Britain out of the separate kingdoms of England and Scotland by the statute of Anne. The separate kingdoms, as distinct political organisms, were lost by merger into the new kingdom with its new organization; and so as to Ireland under the act of George III. A confederation, however, is, as it were, the mechanical union of diverse Bodies-politic, continuing as such under the confederation,

and co-acting in the functions of a common government, but organically distinct and never merged into a new Body-politic. The union, in the apt words of Mr. Choate, "is an artificial aggregation" of the States, which are the "indivisible, indestructible, impenetrable" primordial political entities; and this is in accord with the language of Mr. Madison,¹ where he says: "The Federal and State governments are, in fact, but different agents and trustees of the people, instituted with different powers and for different purposes."

The tenth amendment of the Constitution states this point clearly where it declares that the powers of the United States are powers delegated, but that all not so delegated nor prohibited to the States "are reserved to the States respectively or to the people." The reservation of undelegated and unprohibited powers to the States respectively could not be unless the States still continued as primordial Bodies-politic, to whom, as distinct reservoirs of power, these undelegated and unprohibited powers are reserved.

"The Constitution in all its provisions looks to an indestructible union composed of indestructible States. . . . There was no place for reconsideration or revocation, except through revolution, or through consent of the States."² If through such consent, or by revolution, the union should ever be dissolved, the "primordial particles," the indestructible States, would remain; but the government of the union and the union itself would perish. The being of the States is independent of federation, but the Federal Union depends upon the being of the States. In the language of Montesquieu, quoted by Hamilton,³ "The confederacy may be dissolved, and the confederates preserve their sovereignty." "Without them the general government itself would disappear from the family of nations."⁴

The Supreme Court, in another case, speaking of the gov-

¹ The Federalist, No. XLVI.

³ The Federalist, No. IX.

² Texas v. White, 7 Wall. 700, 725, 726.

⁴ Collector v. Day, 11 Wall. 125.

ernment of the United States, says: "Within its legitimate sphere, Congress is supreme; . . . but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to . . . annul its encroachments upon the reserved power of the States and the people."¹

A very comprehensive statement is made by Chief Justice Chase in *Texas v. White*,² in which he says:

"But the perpetuity and indissolubility of the union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom and independence, and every power, jurisdiction and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the union and the maintenance of the national government."

These views of the Supreme Court are entirely in accord with what we have maintained heretofore. Every government is the delegated agent of some organic Body-politic.

¹ *United States v. Reese*, 92 U. S. 221. ² 7 Wall. 725.

The Body-politic is sovereign; the government is not. Destroy the government, and the Body-politic remains. Destroy the government of a State, and the State still stands.¹ But destroy the government of the United States, and what single Body-politic remains? All that would remain would be the forty-five Bodies-politic — the States.

“The States disunited might continue to exist. Without the States in union, there could be no such political body as the United States.”² “The confederacy may be dissolved, and the confederates preserve their sovereignty.”³ “Without them (the States) the general government itself would disappear from the family of nations.”⁴

One brief statement in the letter of Jefferson to Madison, February 8, 1786, reconciles all the diverse statements of the fathers upon this subject. “With respect to everything external, we be one nation only, firmly hooked together. Internal government is what each State should keep to itself.” That is to say, we are functionally, as to the powers vested in the Federal government by the Constitution, one, though as independent States we are organically separate. There is no merger or fusion of States into one Body-politic. There is a combination and union of all the States as distinct Bodies-politic in the functional government of the one nation of the United States.

The forty-five stars on our flag make one constellation. Each star is distinct, and one star may differ from another star in glory. But they are united in one galaxy by mutual affinities; a galaxy moving and known by one name in the firmament of Christendom, but each with its original name, its distinct life, its separate motion, its special type of civilization, and its own original sovereignty as a Body-politic. The name of this constellation is itself indicative, not of political unity of one people, but of a political union of

¹ *Texas v. White, supra.*

³ *The Federalist*, No. IX.

² *Lane v. Oregon*, 7 Wall. 76;
Texas v. White, supra.

⁴ *Collector v. Day*, 11 Wall. 125.

distinct States—United States; that is, States once separated, now united under the Constitution which they have ratified.

§ 159. It may therefore be affirmed as established, that the States are not organically “one people,” but are functionally one, as to all the powers delegated to the United States by, and as to all stipulations *inter se* in, the Constitution.

The Union is *Staaten-bund*—not *Bundes-staat*. Each State is a republic of which the units are men. The United States is a confederate union, of which the units are not men but States. The States still exist as primordial Bodies-politic, and by their organic union they are a confederation of States,—a Republic of Republics,—but not a new composite, or one new civil Body-politic.

§ 160. The views already presented will be emphasized and confirmed by the inquiry now to be made. What is the nature of the government of the United States established by the Constitution?

That it is a democratic republican government—that is, a government whose exercise of power is based upon elections mediately or immediately by popular suffrage, excluding the monarchic and aristocratic idea in all of its departments—needs no special course of reasoning to establish. But the government has one additional feature which it is important to note. It is a Federal government throughout, in whose organism States are factors, and through which the States as such act with their combined powers. In this sense it may be averred that there is no department of the government of the United States, and no function thereof, which is not mediately or immediately impelled or directed by State authority.

§ 161. Congress, the legislative department, is composed of a Senate and House of Representatives.

Let us first consider the Senate. It is “composed of two senators from each State chosen by the legislature thereof

for six years, and each senator shall have one vote.”¹ In this body, therefore, the States, as co-equal members of the Union, are represented by senators elected by their respective legislatures, and are the constituents of this body. If the States, as independent Bodies-politic, cease to exist, the Senate could not be constituted, and the United States government would cease to be.

Taking the present census, Nevada, with 40,000 people, has an equal voice in the Senate with New York, with 6,000,000 people; or one man in Nevada has equal voice with one hundred and fifty men in New York. Why? Because States, not men, are constituents of the Senate.

On the other hand, in the House of Representatives the equipollency of the States is disregarded. The power of the State is in proportion to its voting population.² Though this is so, the House is the representative of the States. This appears from the following reasons: The Constitution declares it “shall be composed of members chosen every second year by the *people* of the *several States*.”³ “Each State shall have at least *one representative*.”⁴ “Until such enumeration shall be made, the *State* of New Hampshire shall be entitled to choose three,” etc.⁵ “Representatives shall be apportioned among the several States according to their respective numbers.”⁶ “When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancy.”⁷ The number of electors in each State shall be “equal to the whole number of senators and representatives to which each State may be entitled in the Congress.”⁸ In any vote for President in the House of Representatives, “the representation from each State having one vote.”

Furthermore, the representative when elected must be an inhabitant of that State in which he shall be chosen. Each

¹ Const. U. S., Art. I, sec. 3.

⁵ Id.

² Id., Art. I, sec. 2, and Id., 14th Amendment.

⁶ Id.

⁷ Id., clause 4.

³ Id., Art. I, sec. 2, clause 1.

⁸ Id., Art. II, sec. 1, clause 2.

⁴ Id., clause 3.

State must have a representative, however small its number, and thus Nevada has a representative for 40,000 people, and New York a representative for every 180,000 people; thus giving disproportion of influence to the inhabitants of the small State to that of the inhabitants of the large State, because the *State* is represented, and not its people. Furthermore, the voters in each State shall have the qualifications prescribed for voters for members* of the most numerous branch of the State legislature; that is, they are prescribed by its own Constitution. The constituent suffragans of the representative are, therefore, fixed as to qualification by State action.

The populations of two small States cannot be combined to elect a representative; there is no merger of statehood in the constituency of representatives in the House; but each State, because it is a State, however small, must have its one representative at least. These facts demonstrate that in the House, as well as in the Senate, States are represented — in the Senate, on the principle of equipollency of statehood; in the House, in proportion to the numbers of each State.

Under this system it is obvious that, even in the House of Representatives, the will of a majority of the population of the whole United States may be defeated, because the small States must have one representative, and are therefore not always represented in proportion to numbers. But an act passed by the House approximately representing the will of the members may be defeated in the Senate by a majority of the States which have only about one-fourth of the population of the United States. Thus one-fourth may defeat the will of three-fourths of the population.

This result, which would be so anomalous if the United States constituted but one civil Body-politic, is perfectly explicable when we remember that the union is a union of States, not of men; and that States, not men, legislate for the Union.

§ 162. Let us now examine the executive power vested in the President of the United States. The President is chosen

by electors. "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the State may be entitled in the Congress." The mode of appointment is absolutely under the direction of the legislature. The number of electors to which each State is entitled combines the principle of State equipollency and the State in proportion to numbers. By this mode Nevada has three electors for her 40,000 people, or one for every 13,000; New York has thirty-six for her 6,000,000 people, or one for every 170,000; thus giving one man in Nevada the weight of thirteen in New York in the election of President.

If an election through the electoral colleges fail, the election of President must be made by the House of Representatives, in which the representation of each State casts the one vote of that State; or Nevada, with 40,000 people, casts an equal vote with New York, with 6,000,000; or one man in Nevada has the weight of one hundred and fifty in New York in the election of a President by the House of Representatives. The President may thus be elected by a majority of States having only one-fourth of the whole population of the Union. And so if there is no election of Vice-President by the electoral colleges, the Senate elects one, in which body the States are equal in vote, and the same disregard of the power of numbers in favor of the equipollency of States as in the election of President by the House is shown. States, not men, are the constituents of the executive.

§ 163. The same lesson may be drawn from the judiciary and other officers of the government. They are nominated by the President, who, as we have seen, is the representative of numbers and the equipollency of States, and confirmed by a majority of the Senate, where the States are equal in vote. Thus States, not numbers, have the largest weight in the selection of the officers of government.

§ 164. The method of distributing the great functions of government adds weight to this view.

Congress has power to declare war. If the House, representing in the main the numerical strength of the States, should favor a declaration of war, a just war may be defeated by one-fourth of the people represented in a majority of the States in the Senate.

Treaties of peace are made by the President, by and with the advice and consent of the Senate; two-thirds of the senators present concurring. Peace may be defeated and the war continued if one State more than one-third of the Senate oppose it, though representing, it may be, only one-twelfth of the people of the United States.

These remarkable results show that, in the important functions of war and peace, the decision is made, not by numbers of men, but at the will of equal States.

§ 165. Lastly, let us examine the power of amending the Constitution of the United States.

Amendments may be proposed by a two-thirds vote of the two Houses of Congress. This denies to a numerical majority of the people of the United States the right even to propose amendments. Such a proposal may therefore be defeated by one vote more than one-third of the States in the Senate; that is to say, the dissent of about one-twelfth of the people may prevent the proposal of an amendment. But the proposed amendment must be ratified by the legislatures or conventions of three-fourths of the several States; so that one State more than one-fourth or one-nineteenth of the numbers of the people of the United States may prevent an amendment of the Constitution. It is true that all the States agreed that an amendment might be made without requiring unanimity of the States. To require three-fourths was agreed by all to be sufficient for amendment. But if an amendment were proposed to take away the equal vote of any State in the Senate — Nevada, for example — it would require the consent of Nevada to validate the amendment. In other words, the equipollency in the Senate of a State containing 40,000 people is secured, though 70,000,000 people in all the other States should demand it; that is, one man in

Nevada can veto what fifteen hundred men in other States demand.

To state it numerically, eleven States, containing 2,000,000 people, could defeat an amendment ratified by thirty-four States, containing 68,000,000 people; or three-fourths of the States, containing 30,000,000 people, could ratify an amendment, though one-fourth, containing 40,000,000, should refuse to ratify it. But, in this last case, the protection of the populous States against an amendment so favored is to be found in the fact that two-thirds of the House of Representatives, representing the numerical force of the States, must concur in proposing the amendment. These guards were considered ample, because requiring an extraordinary combination of large and small States to fasten any amendment on the Constitution.

The provision which fixed irrevocably the equipollency of each State in the Senate, unless such State surrenders it by its separate consent, is clear evidence that no change in this respect can be made but by a new compact, to which each State, as a distinct factor, must be a party. It proves the continuing and perpetual independence of the State as a primordial political particle, in order to its own protection against the *vox majoritatis*, whether of population or of States. It proves more. If the State was not to be preserved as an equal in sovereignty, despite a difference in population, there is no assignable reason for thus shielding its equality in the Senate against all action but at its own will and at its own consent. This equality of sovereignty in the Senate of each State is the only unchangeable principle in the whole Constitution. A State in its essential equality can never be destroyed but by its own separate will. This clause as to amendments, therefore, shows that while numbers and States in the two Houses of Congress propose amendments, the States through their separate legislatures or conventions must ratify the proposed amendments, and each State must ratify an amendment taking away its equipollency in the Senate.

States are therefore — and not numbers — the chief factors in amending the constitutional compact.

§ 166. From this review it is obvious that, without the continuing existence of States and State governments *de jure* and *de facto*, the Federal government itself would cease to be.

Suppose the legislatures refused to elect senators; where would be the laws, treaties, judiciary and officers of the government? Suppose the States should not provide for the mode of appointment of electors; where would be the executive? Suppose there were no State legislatures; how could the Constitution be amended? If each State as a people ceased to exist, how could the amendments be ratified by a convention of the people of that State?

If the States in their full autonomy as independent Bodies-politic are pulled down, the Federal Samson would be destroyed amid their ruins.

CHAPTER VI.

TWO IMPORTANT COMPROMISES IN THE CONSTITUTION OF THE UNITED STATES.

§ 167. During the session of the convention of 1787 there were great conflicts which resulted in two important compromises, one of which related to the organization of power in the machinery of the government, and the other to certain powers of the government and reserved rights of the States, which it is now important to present to the reader.

In that great convention the master minds of the New World were present: Washington and Franklin, Hamilton and Madison, King and Mason, Ellsworth and Rutledge, the Pinckneys and Morris, Randolph and Gerry, Sherman and Martin, Patterson and Dickinson, Johnson and Wilson, Langdon and Williamson, Davie and Brearly, Wythe and Gorham, Blair and Butler, Livingston and Read, Baldwin and Bedford, and others. They came together with a full sense of the political wants of the era and of the various remedies proposed, impressed with the need for enlarged powers in the general government, but of the essential need of securing the liberty of the people of the States.

How shall a union of all be formed adequate to the defense of each, and the well-being of all the general interest, which will yet conserve the internal polity of the separate States, and the liberty of their people? How shall the diverse interests of the States, as units in this Federal empire, be so represented in the distribution of political authority that power and liberty be not divorced? Revolution had cut the cords which bound these young republics to the thoughts and political philosophy of the old world. To

destroy the old system and to upheave the ancient foundations had been a mighty but successful work. But to construct a new political edifice on a solid basis of constitutional wisdom, this was the herculean labor of our fathers a hundred years ago.

They were too wise to attempt a new order of things. They proposed to amend the old order and give it automatic efficiency; to increase the functions of the old union of States, but not to change radically its organism; to lay its foundation upon the will of sovereign peoples, and not on the caprice of their ephemeral legislatures; to make the many one as to all matters where interests, relations and rights were one, but to leave them separate and many where polity, right and interest were many and distinct. To grant power to all as a right in which all had the same interest was to wed power to right, which is the security of liberty; not to reserve power to each as to rights peculiar to each, and as to which all others were strangers, was to divorce power from right, which is the peril of freedom.

§ 168. Two leading and rival schemes were presented to the convention. The one, the Virginia plan, really matured if not originated by Madison, but introduced and advocated with great ability by Randolph, May 29, 1787; and the other by Judge Patterson, of New Jersey, June 15, 1787. Besides these, a plan in form and fullness of detail more like the instrument finally adopted than any other was proposed by young Charles Pinckney, of South Carolina, on the same day that Randolph presented his proposition. Whether the draft found in the Journal of the Federal Convention and in Mr. Madison's Debates be precisely the same as that presented by Mr. Pinckney may well be doubted.¹ It must have been very much the same, although in details it may have been changed by Mr. Pinckney in the draft which he furnished in 1818. Mr. Hamilton also suggested a plan, June 18th, which was so radically centralizing in its features, and

¹ Madison Papers, Append., Nos. 2, 3 and 5.

contrary to the popular views of government which then prevailed, that it was neither referred nor voted on.¹

But the votes of the convention and their debates were chiefly on the rival plans of Mr. Randolph and Mr. Patterson.

Mr. Patterson's scheme involved two main propositions.² His plan proposed in substance:

1st. A single house composed of the representatives of co-equal States, as under the Articles of Confederation, with power to raise revenue by custom duties, and by taxes through requisitions on the States.

2d. To make the efficient operation of many of the Federal acts dependent on State action, with a power of armed coercion by the Federal authority against recusant States.

The first of these gave the absolute control of the government as to taxes and other matters to a majority of States, which might be only one-fourth of the whole population.

The second, while giving to Congress the power to enact, without power to execute its purposes except through the States, gave power to Federal authority to coerce them with armed forces. This proposal to use force had been strongly condemned and postponed by unanimous vote of the convention.³ Mr. Patterson's plan was substantially rejected on the 19th of June, 1787,⁴ by a vote of seven States against, three for it, and one State divided. The Randolph plan, which, in a modified form, had been reported from the committee of the whole on the 13th of June,⁵ was then taken up for debate.

To understand the nature of the first compromise in the convention, which related to the organization of power in the legislative department, it may be well to state the facts as to the relative populations of the different States at the period of the convention. Taking the census of 1790 as the approximate measure of relative population, the four largest

¹ Madison Papers, 890-92, and
note.

² Id. 863-67.

³ Id. 761.

⁴ Id. 904.

⁵ Id. 858-61.

States — Massachusetts, Virginia, Pennsylvania and North Carolina — would have had a clear majority of numbers over the other nine States on a basis of popular representation. On the basis of States, seven small States, with about one million of population, would have had a clear majority over the other six with nearly three millions. The second of the resolutions reported from the committee of the whole was in these words: “*Resolved*, That the national legislature ought to consist of two branches.” The word “national” being struck out, the resolution that the legislature should consist of two branches passed, by seven States to three — one being divided.¹ It will be seen that, if Congress consisted only of one house, the conflict between the basis of representation by States, or in proportion to population, was irreconcilable. The adoption of the bi-cameral plan was therefore an important step in the direction of the final compromise. The proposition to elect the first branch of the legislature by the people was carried by a vote of nine States to one — one State divided.² This proposition did not necessarily involve the non-equality of the States in that branch, but only that the members of that branch should be elected by the people and not by the legislatures of the States.³

The next step was as to the election of the second branch. After many propositions had been rejected, it was finally proposed that the members of this branch be chosen by the legislatures of the States. It passed by the vote of nine States to two. It will be observed that this did not involve the equality of the States, but only the mode of electing its members, and the mode adopted made this branch dependent for its existence on the co-existence of the State legislatures. It conserved the perpetuity of the State governments, by making the existence of the Senate dependent on the co-existence of the State legislatures. If the legislatures were destroyed the Senate would fall with them.⁴

¹ Journal of Federal Convention, 141; also Madison Papers, 925.

³ Id. 141.

² Madison Papers, 989.

⁴ Journal of Federal Convention, 147; also Madison Papers, 959.

The seventh resolution, which declared that in the first branch the rule of the Articles of Confederation, that is, co-equality of States, should not be maintained, was then taken up. This was the battle ground for a great debate, in which Luther Martin, Sherman, Ellsworth, Madison and others took part. Mr. Madison maintained that State equality as to taxation would give to seven States, with one-fourth of the whole population, power over three-fourths; that the large States under the confederation were protected by their reserved power to refuse to submit to unjust requisitions made by a majority of States—a power they would no longer have under the new Constitution. Sherman said: “The question is, how the rights of the States may be most effectually guarded?” Martin maintained the principle of State equality in the first branch. The firm position of the two contending parties produced a crisis in the convention.

Dr. Franklin solemnly said: “I have lived, Sir, a long time, and the longer I live the more convincing proof I see of this truth, *that God governs in the affairs of men*. And if a sparrow cannot fall to the ground without His notice, is it probable that an empire can rise without His aid? We have been assured, Sir, in the Sacred Writings, that ‘except the Lord build the house, they labor in vain who build it.’ I firmly believe this; and I also believe that, without His concurring aid, we shall succeed in this political building no better than the builders of Babel.” He suggested the opening of the convention each day with prayer.¹

George Mason, on the 7th of June, had spoken of the necessity of giving to the State legislatures some means of defending themselves against the encroachments of the general government; “and what better means can we provide than the giving them some share in, or rather to make them a constituent part of, the national establishment?”² On the 25th of June he had said that the State governments should have the means of self-defense; “if they are to be preserved, as he conceived to be essential, they certainly ought to have

¹ Madison Papers, 985.

² Id. 820.

this power, and the only mode left to give it to them was by allowing them to appoint the second branch of the legislature."¹

Dr. Johnson, of Connecticut, on the 29th of June took part in the debate which had brought the convention to the crisis above referred to. He said: "Does it not seem to follow, that if the States as such are to exist they must be armed with some power of self-defense? This is the idea of Colonel Mason, who appears to have looked to the bottom of this matter." And then referring to the fact that the population and States should both be considered, he said: "The two ideas embraced on different sides, instead of being opposed to each other, ought to be combined; in *one* branch the *people* ought to be represented, in the *other* the *States*."² After further debate the rule of equality for the first branch was rejected: six States against it, four States in its favor, and one State divided.³

Mr. Ellsworth then proposed that the rule of suffrage in the *second* branch be that established by the Articles of Confederation. He said the first branch being based on population "would secure the large States against the small," and equality of votes in the second branch "was necessary to secure the small States against the large. He trusted that on this middle ground a compromise would take place. . . . The power of self-defense was essential to the small States. Nature had given it to the smallest insect of the creation." He further said: "All New England, except Massachusetts, would reject the scheme, if some such compromise was not adopted."⁴

Dr. Franklin quaintly remarked: "When a broad table is to be made and the edges of the planks do not fit, the joiner takes a little from both and makes a good joint. In like manner, here, both sides must part with some of their demands, in order that they may join in some accommodating proposition." He then laid on the table for consideration a propo-

¹ Id. 958-59.

³ Id.

² Id. 987.

⁴ Id.

sition containing this: "That the legislatures of the several States shall choose an equal number of delegates to compose the second branch of the General Legislature."¹ Mr. Ellsworth's motion allowing each State one vote in the second branch was lost by an equal division: five States to five—Georgia divided. These several movements resulted in the adoption of the motion of General Pinckney to appoint a committee consisting of one member from each State to report some compromise. After warm debate it was carried: ten States to one.² Adjournment was made July 2d until after the anniversary of the Declaration of Independence; but on the 5th of July the committee made its report. Dr. Franklin in that committee moved for population as the basis of representation in the first branch, with power to originate money bills, and with equality of States in the second branch. This had been Sherman's suggestion on the 11th of June, when it was rejected by a vote of five States to six.³ After long debate, on the 16th of July the proposition involving the representation of States according to population in the first branch, and the representation of States in the second branch, was agreed to by a vote of five States to four—Massachusetts divided.⁴

This ended the great conflict. The compromise thus adopted, by which the States according to numbers were represented in the first branch, and the States as equipollent sovereigns were represented in the second branch, operated to protect a majority of the whole population as to burdens and taxes from the rule of a minority, and to protect the States, as such, from the rule and domination of numbers. This conserved State right of personal liberty to men, but so as to secure individual men in their equal rights of property against an oligarchy through the exclusive power of the small States over the large ones.

This system is a splendid example of power wedded to

¹ Id. 1009.

³ Id. 1024 and nota.

² Id. 1017-23.

⁴ Id. 1107.

right. Power in one branch was given to numbers in order to the security of men in their personal liberty; and power was given to the States in the other branch for the security of the States as free commonwealths. By requiring all law thus to have the assent of both branches, the legislative department was the expression of the philosophic principle of concurrent majorities, by which a majority of each of two conflicting authorities was required to all action in order to the protection of the right of each against the adverse action of the other. This provision for an equal vote of the States in the Senate was clinched by the motion made September 15th, that "no State, without its consent, shall be deprived of its equal suffrage in the Senate," which was unanimously adopted.¹

This was the first great compromise of the convention between the large and the small States.

§ 169. The second compromise was more complicated and involved a larger number of items.

In the original plan of Mr. Randolph, it had not been determined whether to base representation on the quotas of contribution to the treasury, or on the number of free inhabitants. We have seen that the proposition to elect the first branch by the people of the several States was adopted by a vote of nine States to one.

The committee of the whole, which reported nineteen resolutions on June 13th, had in their seventh resolution resolved that the rights of suffrage in the first branch should be "according to some equitable ratio of representation, namely: in proportion to the whole number of white and other free citizens and inhabitants of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons." This was according to the ratio proposed by Congress under the Articles of Confederation, April 18, 1783, as the basis for contributions by the States to the Federal treasury. On the 5th of July the

¹Id. 1592-93.

committee who reported the compromise (composed of one member from each State) fixed the basis of representation in the first branch of the legislature at one member for every 40,000 inhabitants of the description reported in the seventh resolution above recited.

In that resolution,¹ the seventh resolution reported by the committee of the whole is referred to,² which contained the ratio proposed by Congress as an amendment to the Articles of Confederation, April 18, 1783, as to contributions by the States to the Federal treasury; so that the basis proposed April 18, 1783, for the quotas of the States to the Federal treasury was adopted by the convention as the basis of representation in the first branch of the legislature, and the proposition for this as the basis of representation was adopted July 16th by a vote of five States to four.³ On the 9th of July a provision which was finally sanctioned on the 16th of July, for an approximate representation of the several States at the beginning of the government, was added, and provision for changes properly to be thereafter made upon a periodical census were established.⁴

Gouverneur Morris, on the 12th of July, proposed "that direct taxation shall be in proportion to representation." This brought the convention to the point that representation and taxation are correlative, so that representation and taxation in the plan which was passed on the 16th of July were established on the basis of the free population of each State and three-fifths of the slaves.

This matter had been largely debated in the Congress of the confederation, as well as in the convention, upon the point that, if the basis of representation was numbers, all slaves as human beings should be counted; but if slaves were property and not human beings, they should not be. Such a debate was rather a play upon words, and was put aside by a compromise based upon common sense and justice, as above stated, but resting upon the number of the whole free population in each State and three-fifths of the slaves.

¹ Id. 1024.

³ Id. 1107.

² Id. 859, 860.

⁴ Id. 1078.

In the course of this great debate, Mr. Madison had sagaciously suggested that the real antagonism in the union would not be between the large and small States, which had already been settled by the compromise mentioned, but between the Northern and Southern States. He said: "The institution of slavery, and its consequences, formed the line of discrimination. There were five States on the Southern, eight on the Northern side of this line." (He counted Delaware on the Northern side, which, if counted on the Southern side, would have made seven States on the Northern and six on the Southern side.) "Should a proportional representation take place, it was true, the Northern would still outnumber the other; but not in the same degree, at this time; and every day would tend towards an equilibrium."

It seemed to have been the opinion of many members north and south that the population would ultimately preponderate in the south, and that while the north would hold the Senate, the south would ultimately hold the House. This would make each section safe against the domination of the other by requiring a concurrent majority of each House to any legislative action. This turned out to be a great mistake. It will be well now to follow the action of the convention on this delicate question to its close in the compromise, which involved this particular question and a number of others.

§ 170. In the original proposition of Mr. Charles Pinckney, there had been two propositions: one prohibiting any tax on articles exported from the States, and requiring that all laws regulating commerce should have the assent of two-thirds of the members present in the House.

The resolutions adopted by the convention on the 26th of July, twenty-three in number, which were the outcome of the long debates on various propositions, to which we have already alluded, were referred, with the propositions offered by Mr. Charles Pinckney on the 29th of May, and by Mr. Patterson on the 15th of June, to a committee of detail.

The convention then adjourned to the 6th of August, to

allow the committee time to to prepare and report the Constitution.¹

Mr. Rutledge delivered the report on the 6th of August.² In that report the provisions against taxes on exports and requiring all navigation acts to have the assent of two-thirds of each House were embraced; also a proposition against a prohibition of all interference with the slave trade, and requiring that direct taxation should be based upon the whole population of the States and three-fifths of the slaves, and making provision for a periodical census to determine these numbers every ten years. The debates upon these various propositions were earnest and prolonged.

The prohibition of the taxes on exports was passed by a vote of seven States to four.³

The question of the slave trade was then debated. The provision, as reported, was against any interference with it. Mr. Ellsworth said: "Let every State import what it pleases. The morality or wisdom of slavery are considerations belonging to the States themselves."⁴ Mason denounced "this infernal traffic" as originating in the avarice of British merchants. The British government constantly checked the attempts of Virginia to put a stop to it. General Pinckney declared that if he and his colleagues were to sign the Constitution containing a provision to prohibit the slave trade, though they should use their personal influence in its favor, "it would be of no avail towards obtaining the assent of their constituents."⁵ Rutledge said North Carolina, South Carolina and Georgia would never agree to the plan if the power to prohibit the slave trade was granted to Congress.⁶ Sherman said "it was better to let the Southern States import slaves than to part with them, if they made that a *sine qua non*."⁷ Mr. Morris wished the whole subject to be recommitted, including the clause relative to taxes on

¹ Id. 1220-26.

² Id. 1226.

³ Id. 1338.

⁴ Id. 1388-89.

⁵ Id. 1390-92.

⁶ Id. 1395.

⁷ Id. 1396.

exports and to a navigation act, suggesting that these things might form a bargain among the Northern and Southern States.

All of these questions were referred to a committee of eleven. On the 24th of August the committee reported. The report embraced these propositions: That the slave trade should not be prohibited prior to 1800, but the slaves might be subject to a duty; the clause requiring a capitation tax to be in proportion to the census, and the clause requiring a two-thirds vote on navigation laws to be stricken out, and no taxes to be assessed on exports. General Pinckney proposed to insert "1808" for the year "1800" in the report. Gorham of Massachusetts seconded the motion. It passed in the affirmative — New Hampshire, Massachusetts, Connecticut, Maryland, North Carolina, South Carolina and Georgia — seven ayes; New Jersey, Pennsylvania, Delaware and Virginia — four noes. A tax or duty not exceeding \$10 was to be imposed on each person imported. The capitation clause was agreed to *nem. con.*¹ Mr. Pinckney moved to require the assent of two-thirds of the members of each House to a regulation of commerce. General Pinckney opposed this motion, because of the liberal conduct of the Eastern States upon the question of the slave trade.²

The language of General Pinckney is to be explained by reference to the fact that an understanding on the two subjects of navigation and slave trade had taken place between the New England States and the three extreme Southern States.³ After a very warm debate, the motion to require two-thirds was rejected, four States to seven, but was finally agreed to *nem. con.* Mr. Butler, of South Carolina, then moved at once a clause for the surrender of fugitive slaves, which was agreed to *nem. con.*

The effect of these several provisions was a compromise between the commercial States and the three Southern States

¹ Id. 1427-30.

² Id. 1451 and note.

³ Id. 1450-51.

of North Carolina, South Carolina and Georgia, embracing the following propositions:

1st. Congress to regulate commerce by a majority vote.

2d. The slave trade not to be prohibited before 1808.

3d. Representation and taxation to be based on the free population and three-fifths of the slaves.

4th. The exemption of exports from duties or taxes.

5th. The compact for the surrender of fugitive slaves.

In connection with the first compromise between the large and the small States, the power of the House, which represented the people, to originate revenue bills was also adopted.¹

[The Constitution having been adopted by the convention and ratified by a sufficient number of States to make it a binding compact between the parties to it, the first ten amendments were incorporated into it before December, 1791; the eleventh amendment was added in 1793, and the twelfth in 1804—the latter growing out of the Presidential election of 1801.

The first ten amendments were limitations on Federal power, and were adopted, not for the purpose of enlarging the scope of Federal powers, but rather of defining and limiting those already granted in the original instrument.

No other amendments have been adopted by the States except the thirteenth, fourteenth and fifteenth, in the years 1865, 1868 and 1870, respectively. In the next chapter the author, before beginning the detailed consideration of the Constitution, discusses the effect of these *post-bellum* amendments, and seeks to show that they have in nowise changed the organic structure of the instrument, though enlarged powers and functions, through them, have been accorded to the Federal government.

These amendments were considered by the author in a paper read before the Social Science Association, at Saratoga Springs, New York, September 6, 1877.—EDITOR.]

¹ Id. 1501 and note, and 1531 and note.

CHAPTER VII.

THE CONSTITUTION AS MODIFIED BY THE CIVIL WAR.

§ 171. We must now proceed to the discussion of the delicate questions which arose out of the conflict of opinion between the States, which resulted in the conflict of arms. Without here discussing the question of secession, it may be stated that three theories as to the right of secession were entertained in the Union. These were as follows:

First. That the Union was a Nation of which the States were subordinate parts, as counties are parts of a State. That the States were not parties to the Constitution as a compact, and that the supremacy of the Federal government and the subordination of the States expressed the relations of the parties to the controversy.

Second. That the Constitution was a compact, but was indissoluble; that the Union was intended to be a more perfect Union than the Confederation, which had been called a "perpetual union;" that membership in the Union by any State, by the act of any one of them, was an indissoluble relation; that it was something more than a compact; that it was the incorporation of a new member into the political body; that it was final, and there was no place for reconsideration or revocation, except through revolution, or through consent of the States; that it became an indestructible Union composed of indestructible States;¹ that no State could claim to secede relying upon its own judgment that the compact had been violated, because the other States held that it had not been violated, and that the dissenting States could enforce their judgment against the seceding States. In this diver-

¹ *Texas v. White*, 7 Wall. 700, 725, 726.

sity of judgment there would be an appeal to arms to enforce the compact upon the seceding States.

Third. That the Constitution was a compact; that the right to assume the powers granted thereby, or to re-assume them, had been expressly reserved in the terms of ratification of the original Constitution by the States of Virginia, New York and Rhode Island; and that each State, though not expressly reserving this right, implicitly did so in case the compact were violated; and that, as there was no common arbiter to decide between the diverse judgments of the States, in the language of Kentucky's resolution, "Each party has an equal right to judge for itself as well of infractions as of the mode and measure of redress."

The seceding States stood upon the third theory; the non-seceding States held either the first or second theory, the latter of which was perhaps most clearly pronounced by President Jackson in his famous proclamation of 1832. The government of the Union sought to enforce the view of the non-seceding States, and the seceding States to maintain their opinion by war. After four years of conflict the tribunal of Mars decreed the reconstruction of the Union, and, to speak forensically, did so by decreeing a specific execution of the constitutional compact by the seceding States as defendants in favor of the non-seceding States as plaintiffs. But in decreeing the obligations of the contract against the seceding States, it was bound to decree all the benefits of the Constitution in their favor. It decreed the restoration of the Union under the Constitution as a whole — the bundle of burdens and of benefits. To that decree the seceding States bowed as final. They had submitted to the jurisdiction of the tribunal of war; they joined issue in its forum; the decision was adverse and from it there was no appeal, and they submitted to its irreversible decree, bound by a solemn sense of duty to observe and uphold the terms of the original constitutional Union.

That this was the result of war, and that the war itself did not change the Constitution in any of its terms or pro-

visions, has been fully sanctioned by the decisions of the Supreme Court, in all of which the court, while denying *in toto* the right of secession — the right to dissolve the Union — “except through revolution, or through consent of the States,” have still maintained that the war merely restored the Union under the Constitution and did not change the Constitution. That it was “a war for the suppression of rebellion,” and was not “a war for conquest and subjugation.”¹

This well-defined judicial view of the effect of the war is in accordance with reason: to believe that a war to maintain the Union under the Constitution and to restore the union of the States could have been a war to restore the union between the States by subjugation, and not the Union under the Constitution, would be not only adverse to the views of the non-seceding States in the institution and conduct of the war, but contrary to the nature of our free institutions and contrary to the reason of things.

And this view is emphatically confirmed by the fact that the Congress of the United States proposed to all the States, the seceding States included, important changes in the Constitution itself by amendments to be consented to by the States under that Constitution;—thus recognizing the continuing integrity of the Constitution itself as the bond of union, and that that Constitution could only be changed by virtue of amendments proposed and ratified in the mode which the Constitution itself prescribed. If the war destroyed slavery in the States, which the Constitution did not allow, where was the necessity of the thirteenth amendment, which was adopted by three-fourths of the States, declaring the abolition of slavery? The adoption of the amendment was a concession by the government of the United States, and all the States, that the war *per se* could not abolish slavery.

The same reasoning applies to all the important provis-

¹Texas v. White, 7 Wall. 726-27.

ions of the fourteenth and fifteenth amendments. It may, therefore, be regarded as a settled principle in respect to the Constitution, that it was not changed in any respect by the war.

This is made more clear by looking to the States which adopted the several amendments. The thirteenth amendment was ratified by twenty-seven States, of which number the seceding States — Virginia, Louisiana, Tennessee, Arkansas, North Carolina, South Carolina, Alabama and Georgia — eight in number — ratified it, and without their ratification it would not be to-day one of the amendments of the Constitution. The fourteenth amendment was ratified by three-fourths of all the States, of whom a part were the seceding States. The fifteenth amendment was ratified by twenty-nine States, of whom nine were of the seceding States.

§ 172. What was the effect of the thirteenth, fourteenth and fifteenth amendments upon the character of the constitutional relations of the States to the government of the United States?

As has been said, these amendments were ratified under the fifth article of the Constitution of the United States providing for amendments, without requiring unanimity of the States; but it will be noted that the requisition of less than all in order to ratify the amendments was agreed to by all as sufficient, under the article of the original Constitution, for amendments. All the States originally agreed that amendments ratified by three-fourths should bind the other fourth without their concurrent ratification; and thus, by the immediate or mediate consent of all the States, the original Constitution and all the amendments to it were made parts thereof by the consent of all the States.

§ 173. Let us look first at the thirteenth amendment.

It may be said that this amendment abolished slavery in States without their consent, and that this was the invasion of State autonomy. But in reality it is *petitio principii* to say that the abolition of slavery was effected without the consent of the several States in which it had existed, for a large

number of the slave States ratified that amendment. Their consent was therefore given to the act. But the States that did not ratify it had bound themselves to agree to amendments of the Federal Constitution upon a ratification of such amendment by three-fourths of the States. Their mediate consent was given through the power of amendments to which they had consented, though immediate consent was withheld.

The thirteenth amendment was adopted on this principle: that the existence of slavery had been, was, and would be, an apple of discord between the members of the Union. It had been the fatal occasion of the civil war. That the States should consent to make it a part of the Constitution, that the institution of slavery should no longer be allowed anywhere in the United States, was therefore a matter for reasonable agreement and compact between the States, and was in analogy to like provisions in the original Constitution. Thus, each State had agreed to be, and to continue, a State with a republican form of government. This was because it was believed no union could succeed between the States unless all its members were republics.¹ This provision denied to States the right to establish any other than a republican form of government in them. Similarly it was matter of compact that the right to import slaves might be forbidden by Congress after 1808.

Both of these limitations upon State power were self-imposed, with a view to the success of the Union. They did not impair State autonomy, except as the several States assented to them as a means of making a better union.

For like reasons the amendment for the abolition of slavery was an agreement between the States (as might have been agreed in the original Constitution) that slavery should cease everywhere, as a means of producing amity and concord between the members of the Union. But furthermore, the amendment involves the concession that, except for the agreement of the States in the ratification of this amend-

¹ Const. U. S., Art. IV, sec. 4; also *Federalist*, Nos. IX, XLIII.

ment, slavery might still exist in any one of the States. The amendment, by declaring that slavery should cease everywhere in the United States, recognized the pre-existent right of each separate State to allow slavery within its borders; and by the use of the phrase, that it should cease in every "place subject to *their* jurisdiction," it recognized the jurisdiction of the United States in places outside of the several States as a multiple of the many separate States. So far, therefore, from this amendment contravening the nature of the old Constitution, it sustains and supports the views already taken of the relations of the Union to the States pre-existent to the war and this amendment.

§ 174. Let us now discuss the fourteenth amendment. This amendment, in the first section, declares: "All persons born, or naturalized in the United States, and subject to the jurisdiction thereof" (*i. e.*, in any one of the United States, or in any Territory or fort, or in the District of Columbia), "are citizens of the United States, and of the State wherein they reside." In the case of *Dred Scott v. Sandford*¹ it was decided that no negro was a citizen within the meaning of the judicial clause of the Constitution which gave jurisdiction to the Federal courts in suits between citizens of different States. The enslaved race, freed by the consent of the States to the thirteenth amendment, and no longer capable of being enslaved, were by this clause of the fourteenth amendment advanced to the status of citizenship of the United States, as well as of the State wherein they resided.

The decision in the above-named case had excited a very hostile sentiment among the Northern States, and, as slavery was destroyed, this amendment was intended to give the status of citizenship to the liberated slaves, so as to reverse the decision in the *Dred Scott* case, and extend the jurisdiction of the Federal courts, under the clause referred to, to cases in which the negro might be a party. Question had also been raised in the Southern States, whether the original Constitution, which provided that "the citizen of each State

¹ 19 How. 393.

shall be entitled to all the privileges and immunities of citizens in the several States," gave to a negro in any State this right of citizenship — whether the negro was entitled to the benefit of this clause of the Constitution.

It is obvious that the above-cited provision of the fourteenth amendment, as to who should be citizens of the United States and of the State wherein they reside, was proper to be adopted, in order to settle the questions which had arisen prior to the war and prior to the abolition of slavery. The States agreed by this amendment that the intercommunication of the privileges and immunities of citizenship should be extended to the freedmen, and that the right of suing in the Federal courts, which had been denied in the *Dred Scott* case, should also be extended to them.

The amendment did more. After having defined citizenship of the United States and of the State, it declared that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The proposal of this provision implies that but for it a State might abridge the privileges of a citizen of the United States, and that it was necessary to prohibit this by an amendment by the States themselves. It was competent for the States, by self-constraint, to agree not to abridge the privileges of citizens of the United States. They did consent by adopting this amendment, and thus, by mutual stipulations, abridged their own powers.

The question now arises, what are the privileges or immunities of citizens of the United States as to the abridgment of which no State shall make or enforce any law?

It will be perceived that the terms of this amendment sharply differentiate citizenship of a State and of the United States. He has rights as the citizen of a State which do not belong to him as a citizen of the United States, and *vice versa*. Can the citizen of the United States vote or hold office or carry on business in every State though not a citizen thereof?

Before considering these questions, we may unite the fourteenth amendment to the fifteenth amendment, which de-

clares that "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude."

In *Minor v. Happersett*¹ the Supreme Court unanimously decided that suffrage was exclusively under State jurisdiction, except "as to race, color, and previous condition of servitude," and that the Constitution in no part of it gave the citizens of the United States any such privilege in any State, and the United States could confer none such; and in this case the court substantially say that, as to citizenship of the United States, the fourteenth amendment did nothing more than introduce into that class those who had been excluded by the effect of the Dred Scott decision.

In *Bradwell v. State*² the court decided that the State had exclusive authority in respect to those who should practice law in its courts, and that the right so to practice was not a privilege of any one as a citizen of the United States.

In the *Slaughter-House Cases*³ the Supreme Court entered into a very full consideration of the character of the fourteenth amendment. The court defined the right of a citizen of the United States in these general terms, as "those which owe their existence to the Federal government, its national character, its constitution or its laws;" in other words, whatever right a citizen has by virtue of the Federal Union, Constitution or government, he holds as citizen of the United States, all others as citizen of a State.

The word "citizen" (as claimed by some authorities) philologically has the same root as "*quies*," or rest; thus it signifies the status of one in rest and safety under governmental power. And, as the citizen has two governments, under each of which he has security of rights, he is a citizen of the United States *quoad* its Federal power, and of the State *quoad* the State power.

In *The United States v. Cruikshank*⁴ Chief Justice Waite,

¹21 Wall. 162.

³Id. 36.

²16 Wall. 130.

⁴92 U. S. 542.

citing the *Slaughter-House Cases*,¹ said: "We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance and whose rights it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other."

The language of the court in the *Slaughter-House Cases*² is explicit. This decision was rendered in 1872, after the ratification of the thirteenth, fourteenth and fifteenth amendments. Mr. Justice Miller delivered the opinion of the court, and after referring to the public sentiment which induced their adoption, he said: "But however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States, with powers for domestic and local government, including the regulation of civil rights—the rights of person and property,—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States and to confer additional power on that of the Nation."

The same course of reasoning would apply to all the detailed provisions of the fourteenth amendment.

In the rapid and constant intercourse between the States and their busy commerce, it was intended by the States to give the mutual assurances that the privileges and immunities of a citizen of the United States should not be abridged by any law of a State, and that the life, liberty and property of all persons should be under the protection of equal laws; but such provisions could not be supposed to affect

¹ 16 Wall. 74.

² 16 Wall. 82.

radically the nature of the Federal system, any more than those in the original Constitution, which assured to the citizen of any State the privileges and immunities of citizens in the several States, or which forbade the States to pass laws impairing the obligations of contracts and the like.

§ 175. Two other provisions of the fourteenth amendment remain to be noticed.

The third and fourth clauses are in effect a condemnation of the act of secession by the States of the Southern confederacy, and this act is denounced as insurrection and rebellion and created a disability on the part of those who participated in the same, and who had taken an official oath to support the Constitution of the United States, to hold any office, civil or military, under the United States, or under any State, and prohibited the United States or any State from paying any debt or obligation accrued in aid of insurrection or rebellion against the United States. This amendment is, by the concurrent consent of the States, a sanction to the theory that the compact between the States is permanent, and that no State can be absolved from it but by the consent of the States or through rebellion.¹

Such an interpretation by the States as the supreme power of the Union, acting as the mandatory and interpreting authority (as in the eleventh amendment), must be taken to settle the conflict of opinion which honestly existed among men prior to 1861, that the States are not bound by a compact revocable or dissoluble at the will of one or more States, but by a compact irrevocable and indissoluble, except by the consent of all, unless through the supreme right of revolution, which Mr. Hamilton says is above all forms of government.²

It may therefore be considered as settled upon the basis of reason, and upon that of judicial decisions, that while these amendments have increased the powers of the general government to some extent, and have abridged the powers of the States, and have given interpretation to the nature of the

¹ *Texas v. White*, 7 Wall. 700.

² *The Federalist*, No. XXVIII.

constitutional compact between them, yet that in all essentials, the system of our Constitutional Union, its structure and its fundamental principles have not been changed. It is a union of States, of which the only bond is the Constitution, a permanent compact, adopted freely by all the States, as parties to it; whereby a government was created into whose every organ the forces of each State, drawn from its legislatures and its people, are infused, and whereby citizen rights in each are secured in all, and the honor and dignity of each is respected and accredited by every State; and by the terms of which the delegated power is made supreme over all and each only when exercised in pursuance of the Constitution; while the powers not so delegated nor forbidden to them are reserved to the governments and people of the States; thus securing by this double system of governments (checks each upon the other), safety and respect among the nations; peace and safe commerce among ourselves under the Federal government; and justice, right and self-rule under the States, as the homes of the people.

CHAPTER VIII.

THE CONSTITUTION OF THE UNITED STATES.

§ 176. In the study of this great instrument, the historical development of which we have traced through the five eras of constitutional history, it will be proper to direct attention to the orderly arrangement of its parts. This is important in connection with the subject of its interpretation.

Article I is devoted to the framework and powers of the legislative department of the government.

Article II to the structure and powers of the executive department.

Article III to the jurisdiction and constitution of the judicial department.

Article IV embraces stipulations as to interstate relations, and as to those of the United States to the States and Territories.

Article V prescribes the mode of amendment of the Constitution of the United States.

Article VI defines the relation of the Constitution of the United States to the several States, and to the officers of government, State and Federal, and the obligations of the United States under the Federal Constitution to the obligations of the same created under the Articles of Confederation.

Article VII prescribes the mode of ratifying the Constitution, and what shall be necessary for its establishment between the States.

The document closes with a declaration of the authority by which it was proposed, its date, and the signatures of the States thereto by their respective deputies.

This arrangement of the instrument will be found to be important in aid of the construction of its various parts.

§ 177. Before discussing the Constitution in its details, it is necessary that we should determine the principles upon which it should be interpreted, and fix upon certain rational canons for the interpretation of its various parts.

In a former part of this work¹ we have defined a constitution substantially as any ordination by the Body-politic — the sovereign power of the people — which constructs a government for the State, and prescribes and defines its powers. Such ordination may be the outgrowth of institutions, and therefore institutional, or it may be evidenced by a written instrument.

The British Constitution, as we have seen, was the historic outgrowth of the institutions of the English people, many of the principles secured therein being established from age to age in the form of written declarations of rights, such as the *Magna Carta* in 1215, the Petition of Right in 1628, and the Bill of Rights in 1688-89, declared by the Convention-Parliament of that date upon the accession of William and Mary to the throne. But we have seen that this British Constitution, valuable as it is, was really adopted by the Convention-Parliament, and not by the sovereign people as a Body-politic. It was ordained by king, lords and commons — the three estates of the realm, — and constituted these three estates of the realm as the government of the kingdom, with an omnipotence *de facto* in the government so created, which was irresponsible save to itself. From age to age new precedents, in the distribution of political power and for the assurance of popular rights, were established by this omnipotent Parliament, and thus the Constitution itself is mutable by the omnipotent government which was created by the Convention-Parliament. "It is," in the language of Mr. Gladstone, "the most subtle organism which has proceeded from progressive history;" but as a constitutional ordainment by the Body-politic, unchangeable by the authority of the government it created, it cannot be deemed a constitution created to our American idea of such an instrument.

¹ § 53.

The American idea implies that a constitution is a sovereign act of the people as a Body-politic by which the government is created and organized, and powers are delegated to it and distributed among its departments through the original essence of political supremacy which is in the people. This Constitution creates a government by its creative and sovereign fiat, and the government holds all its powers through grant from the sovereignty, and none by inherent or original title.

The British Constitution is therefore mutable; the American Constitution is immutable. The British Constitution may be modified by the government without reference to the consent of the real Body-politic; the American Constitution is unchangeable by the government, and the government can acquire no new power nor change its structure, except by a new and amendatory act of the sovereign power.

Whether our fathers derived the idea from others, or from their own reflections, or from both, the doctrine of the sovereignty of the Body-politic as an essence, and the powers of government as merely emanations from this essence of sovereignty, had firm practical hold upon the sages of our revolutionary era. The Body-politic is the source of all authority; the government is the agent or trustee it creates and to which it delegates powers. The sovereignty of the Body-politic is original and inherent; the powers of the government are derivative. The one is the irresponsible and original creator; the other its responsible creature. The one delegates power; the other is the delegated trustee. The one is principal; the other agent. The one is omnipotent; the other limited in power. "The powers that be" are, therefore, primal and secondary. The Body-politic is primal, paramount and supreme; the government secondary, dependent and subordinate.

It will suffice to quote as authority for these fundamental principles the Bill of Rights of Virginia and that of Massachusetts.

That of Virginia, adopted June 12, 1776, in its second sec-

tion declares: "That all power is vested in and consequently derived from the people; that magistrates are their trustees and servants, and at all times amenable to them." Its third section declares:

"That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; of all the various modes and forms of government that is best which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal."

The Constitution of Massachusetts, adopted in 1780, declares in Article V of the Declaration of Rights:

"Art. V. All power residing originally in the people, and being derived from them, the several magistrates and officers of government vested with authority, whether legislative, executive or judicial, are the substitutes and agents, and are at all times accountable to them."

In Article VII it is declared:

"Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people, and not for the profit, honor or private interest of any one man, family or class of men; therefore the people alone have an incontestable, unalienable and indefeasible right to institute government, and to reform, alter or totally change the same when their protection, safety, prosperity and happiness require it."

The preamble declares:

"The end of the institution, maintenance and administration of government is to secure the existence of the Body-politic to protect it and to furnish the individuals who compose it with the power of enjoying, in safety and tranquillity, their natural rights and the blessings of life; and whenever

these great objects are not obtained, the people have a right to alter the government and to take measures necessary for their safety, prosperity and happiness."

These doctrines were enunciated by these two leading States, the first and the most powerful in that era, and were repeated substantially in the bills of rights of all the original States, and the great Declaration of Independence substantially embodies the same doctrine in the following words:

"We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it and to institute a new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."

§ 178. The original Constitutions of the several States of the Union, as those now existent, were the ordinations of the sovereign people of each, and not of their governments. The same was true, as we have seen, in the adoption and establishment of the Federal Constitution. The Federal and State Constitutions each framed and created a government, adjusted its mechanism between the different departments, and then defined and limited their powers. The Constitution in each case created the government, and the government resulted from this creative fiat and not otherwise. This creative authority was original and inherent, from which source alone the powers of government were respectively derived. The one was paramount and supreme; the other subordinate and bound to obedience.

A marked difference must now be noted between State Constitutions and the Federal Constitution. In the structure of a State Constitution it is to be noted that "the immense

mass of legislation,"¹ which is proper for and is reserved to the State governments, is incapable of enumeration; and therefore these governments are deemed to have all powers which are not in express terms, or by implied intention, denied to them. The only powers they have, or can have, are delegated by the Body-politic, but all are presumed to be delegated which are not thus denied in express terms, or by implication, because enumeration of these is impossible.

The case of the Federal Constitution is different. As, prior to its adoption, large powers had been delegated to the State governments, and as the grant of any such to the new Federal government would be taken from the State governments, and as the Federal government itself was constituted for certain general purposes affecting all the States and for the common defense of all, a new constitutional rule was proper to be adopted to wit: That all powers should be granted in the Federal Constitution by enumeration, by delegation, so that the powers vested in the United States by the Constitution should be clearly defined, and "the immense mass of powers" not so granted should, by general reservation, be retained by the States or by the people.

The Federal Constitution, then, is one of grant and delegation of powers to the Federal government. The State Constitution is one in which the powers are presumed to be delegated unless limited by express or implied prohibition. In the case of the Federal Constitution, then, the question of power necessarily is: "Has the power been granted?" In respect to the power of a State government the question is: "Is the power in question prohibited expressly, or by implication, by the State or the Federal Constitutions?" In the one case non-delegation is equivalent to denial of power. In the other case non-prohibition is equivalent to grant.

§ 179. The key to the interpretation of the Federal Constitution may be found in the instrument itself, and is con-

¹Per Marshall, C. J., in *Gibbons v. Ogden*, 9 Wheat. 1.

firmed by the proceedings of the convention which proposed it, and of the State conventions which ratified it; by the cotemporaneous declarations of the period in which it was adopted; and by the judicial decisions of the Supreme Court of the United States.

First. The tenth amendment is clear. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This amendment divides powers into three classes:

1st. Powers delegated to the United States.

2d. Powers prohibited to the States.

3d. Powers reserved, which are not in the first two classes; that is, neither delegated to the United States nor prohibited to the States.

This shows distinctly that the powers of the United States are those which are delegated by the Constitution, and that the powers reserved to the States are those not so delegated nor prohibited to the States. We must therefore reach the conclusion that the line of demarcation between the powers of the United States and the powers of the States must be defined by an enumeration of the powers delegated to the United States; for, as the Constitution does not enumerate powers reserved, but does enumerate powers delegated, no other line of demarcation could be adopted. The special enumeration of powers granted to Congress is found *in extenso* in the Constitution.¹ This is confirmed by the express words of the Constitution: "All legislative powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."²

The same is true of the executive authority³ and of the judicial powers.⁴ In reference to these three departments,

¹ Const. U. S., Art. I, sec. 8, and Art. IV, secs. 1, 2, 3, 4.

³ Id., Art II, sec. 2.

⁴ Id., Art. III, sec. 2.

² Id., Art. I, sec. 1.

the legislative, executive and judicial, the structure of each department defined in Articles I, II and III is followed by a clear and precise enumeration of the powers vested in each.

Thus, while the enumeration of the powers of the United States in all its departments is the measure of Federal power, it is quite as clear, on the other hand, that the limits to State power are prescribed by precisely expressed prohibitions.¹ The Constitution of the United States itself, therefore, shows that the Federal government holds by the delegation of precisely enumerated powers, and the States by a general reservation of all powers not so delegated and not expressly prohibited to them.

This opinion is confirmed by the proceedings of the convention which proposed the Constitution. Without advert- ing in detail to these proceedings, one fact may be stated which is conclusive on this point. After the plan of Mr. Charles Pinckney was presented,² in the sixth article of which³ the powers granted to Congress were precisely enumerated in terms almost the same as in the Constitution finally adopted, Mr. Hamilton read a sketch embracing his views, in which the only definition of legislative power was "to pass all laws whatsoever," subject to the executive veto.⁴ The outline communicated to Mr. Madison, of what he (Hamilton) would have wished to be the proposed Constitution, contained this definition of power: "The Legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defense and welfare of the Union."⁵ The proposition first referred to was not proposed by Hamilton, and was permitted to rest in oblivion, without consideration, by the convention.

In the original plan proposed by Mr. Randolph⁶ it was provided that the National Legislature should "enjoy the legislative rights vested in Congress by the Confederation,

¹ Const. U. S., Art. I, sec. 10.

² Madison Papers, 735-46.

³ Id. 739-42.

⁴ Id. 890.

⁵ 3 Madison Papers, Appen., 24.

⁶ Madison Papers, 731-35.

and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.¹

Mr. Patterson's plan, as far as powers were concerned, was drawn in terms which gave to Congress some important enumerated powers, in addition to those granted to Congress by the Articles of Confederation. The action of the convention upon these various schemes proposed was very significant, made from the committee of detail, to whom the Randolph, Pinckney, and Patterson plans were referred. The Hamilton plan was not even referred to that committee. The Pinckney scheme was that reported by the committee of detail, as far as the definition of the powers of Congress was concerned,² and in its general framework was that finally adopted, with many modifications, so that the action of the convention clearly evinces its purpose to define the extent of Congressional power by a precise enumeration of those intended to be delegated. The same general result will be seen by reference to the proceedings of the State conventions which ratified the Constitution. Thus in the Virginia convention one speech may be referred to, and that the speech of John Marshall on the 16th of June, 1788, when the power of the General government and of the States in respect to the militia was under discussion. The whole speech is worthy of perusal, but it is too long for insertion. A few extracts may be given. He said:

“The State governments did not derive their powers from the General government. But each government derived its powers from the people; and each was to act according to the powers given it. . . . Could any man say that this power was not retained by the States, as they had not given it away? For does not a power remain till it is given away? The State legislatures had power to command and govern

¹Id. 732.

²Id. 1226-42.

their militia before, and have still, undeniably, unless there be something in this Constitution that takes it away. . . . There are no negative words here. It rests, therefore, with the States. . . . All the restraints intended to be laid on the State governments (besides where an exclusive power is expressly given to Congress) are contained in the tenth section of the first article. . . . The power of governing the militia was not vested in the States by implication; because being possessed of it antecedent to the adoption of the government, and not being divested of it by any grant or restriction in the Constitution, they must necessarily be as fully possessed of it as ever they had been; and it could not be said that the States derived any powers from that system, but retained them, though not acknowledged in any part of it.”¹

This language of the great chief justice, when a party to the ratification of the Constitution by the convention of Virginia, is conclusive upon the point which we are considering, that the States retained all powers not exclusively delegated to the United States or not expressly prohibited to the States.

The same views will be found in several numbers of the *Federalist*. Mr. Hamilton says:²

“The State governments would clearly retain all the rights of sovereignty which they before had, and which were not by that act (the Constitution of the United States) *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of State sovereignty, would only exist in three cases: where the Constitution in express terms granted the exclusive authority to the union; where it granted, in one instance, an authority to the union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the union to which a similar authority in the States would be absolutely and totally *contradictory and repugnant*.”

¹ Virginia Debates, 298-99.

² The Federalist, No. XXXII.

He illustrates the first of these by the exclusive jurisdiction given to Congress over the District of Columbia. The second, by the power given to Congress to lay and collect duties, etc., and the prohibition to the States to lay any duties on imports or exports.¹ The third is illustrated by the power given to Congress to prescribe an uniform rule of naturalization; as each State, if it possessed this power at all, would prescribe a distinct rule, that power is excluded by the grant to Congress of the right to establish an uniform rule.

Again: "The rule that all authorities, of which the States are not explicitly divested in favor of the union, remain with them in full vigor, . . . is clearly admitted by the whole tenor of the instrument. . . . We there find that, notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. . . . This circumstance is a clear indication of the sense of the convention and furnishes a rule of interpretation out of the body of the act, which justifies the position I have advanced and refutes every hypothesis to the contrary."²

§ 180. Mr. Madison says:³ "The proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects and leaves to the several States a residuary and inviolable sovereignty over all other objects."⁴

Mr. Madison, in his celebrated report of 1799, lays down this canon of construction as to the powers of Congress, including what has been termed the coefficient power,⁵ which he declares to be a power in Congress to exercise "all the incidental and instrumental powers necessary and proper for

¹ Const. U. S., Art. I, secs. 8, 9.

⁴ See also remarks of Mr. Madison, already cited, Id., No. XLI.

² The Federalist, No. XXXII. See also Id., Nos. XXXIII and XXXIV.

⁵ Const. U. S., Art. I, sec. 8, clause

³ Id., No. XXXIX.

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carrying into execution all the expressed powers: . . . It is not a grant of new powers to Congress, but merely a declaration for the removal of all uncertainty, that the means of carrying into execution those otherwise granted are included in the grant.

"Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power, and necessary to its execution. If it be, it may be exercised by Congress. If it be not, Congress cannot exercise it."¹

The judicial decisions of the Supreme Court confirm these views. A citation of a few of these will be made.

In *Martin v. Hunter*,² Judge Story, delivering the opinion of the court, said:

"It is perfectly clear that the sovereign powers vested in the State governments by their respective Constitutions remain unaltered and unimpaired, except so far as they were granted to the government of the United States." (He refers to the words of the tenth amendment in confirmation.) . . . "The government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."

In *Gibbons v. Ogden*,³ Chief Justice Marshall, speaking of the situation of the States prior to the Constitution, said:

"It has been said that they were sovereigns, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their Congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to

¹ Resolutions of Virginia and Kentucky of 1798-99, p. 49.

² 1 Wheat. 325.

³ 9 Id. 187.

enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which the change was effected. "This instrument contains an enumeration of powers expressly granted by the people to their government." Again:¹ "In our complexed system, presenting the rare and difficult scheme of one general government whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments which retain and exercise all powers not delegated to the Union, contests respecting power must arise."

In the great case of *M'Culloch v. Maryland*,² Chief Justice Marshall laid down this canon of construction, which was not in the interest of a strict construction of the Constitution, but of a fair and liberal one, and has been sanctioned in a number of later and recent cases in the Supreme Court of the United States:

"Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."³

Mr. Hamilton proposed a rule in the cabinet discussion of the bank question, which is quoted by Mr. Justice Field in the *Legal Tender Cases*,⁴ and which is very similar to the rule given above by Chief Justice Marshall. Mr. Hamilton said: "If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end and is not forbidden by any particular provision of the Constitution, it may be safely

¹ Id. 205.

² 4 Wheat. 316, 416.

³ *Accord*: *Calder v. Bull*, 3 Dall. 386; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Gilman v. Philadelphia*, 3 Wall. 713; *Lane County v. Oregon*, 7 id. 71; *Hepburn v. Griswold*,

8 id. 603; *Collector v. Day*, 11 id. 113; *Slaughter-House Cases*, 16 id. 36; *Legal Tender Cases*, 12 id. 457; *United States v. Cruikshank*, 92 U. S. 542-50.

⁴ 12 Wall. 641.

deemed to come within the compass of the national authority."

§ 181. A fair and comprehensive statement by an able author and jurist may be added, as well for its intrinsic merit as because it gives a confirmation of the views insisted upon by a jurist who cannot be regarded as especially partial to a strict construction of the Federal Constitution. It also confirms the distinction above taken between the construction of powers under a State Constitution and under the Constitution of the United States.

"The government created by the Constitution is one of limited and enumerated powers, and the Constitution is the measure and the test of the powers conferred. Whatever is not conferred is withheld, and belongs to the several States, or to the people thereof. As a constitutional principle this must result from a consideration of the circumstances under which the Constitution was formed. The States were in existence before, and possessed and exercised nearly all the powers of sovereignty. The Union was in existence, but the Congress which represented it possessed a few powers only, conceded to it by the States, and these circumscribed and hampered in a manner to render them of little value. The States were thus repositories of sovereign powers, and wielded them as being theirs of inherent right; the Union possessed but few powers, enumerated, limited and hampered, and these belonged to it by compact and concession. In a confederation thus organized, if a power could be in dispute between the States and the Confederacy, the presumption must favor the States. But it was not within the intent of those who formed the Constitution to revolutionize the States, to overturn the presumptions that supported their authority, or to create a new government with uncertain and undefined powers. The purpose, on the contrary, was to perpetuate the States in their integrity, and to strengthen the Union in order that they might be perpetuated. To this end the grant of powers to the Confederacy needed to be enlarged and extended, the machinery of government to be

added to and perfected, the people to be made parties to the charter of government, and the sanction of law and judicial authority to be given to the legitimate acts of the government in any and all of its departments. But when this had been done, it remained true that the Union possessed the powers conferred upon it, and that these were to be found enumerated in the instrument of government under which it was formed. But, lest there might be any possible question of this in the minds of those wielding any portion of this authority, it was declared by the tenth article of the amendments that 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.'

"From what has just been said, it is manifest that there must be a difference in the presumption that attends an exercise of National and one of State powers. The difference is this: To ascertain whether any power assumed by the government of the United States is rightfully assumed, the Constitution is to be examined in order to see whether expressly or by fair implication the power has been granted, and, if the grant does not appear, the assumption must be held unwarranted. To ascertain whether a State rightfully exercises a power, we have only to see whether by the Constitution of the United States it is conceded to the Union, or by that Constitution or that of the State prohibited to be exercised at all. The presumption must be that the State rightfully does what it assumes to do, until it is made to appear how, by constitutional concessions, it has divested itself of the power, or by its own Constitution has for the time rendered the exercise unwarrantable."¹

Again (citing *Ableman v. Booth*, 21 How. 506, 520; *United States v. Cruikshank*, 92 U. S. 542), he says:² "The Congress of the United States derives its power to legislate from the Constitution, which is the measure of its authority; and any enactment of Congress which is opposed to its pro-

¹ Cooley on Constitutional Law, ² *Id.*, pp. 31, 32.
pp. 29-31.

visions, or is not within the grant of powers made by it, is unconstitutional, and therefore no law, and obligatory upon no one."

And again (citing *Ex parte Milligan*, 4 Wall. 2, 120), he says:¹ "The Constitution itself never yields to treaty or enactment; it neither changes with time, nor does it in theory bend to the force of circumstances. It may be amended according to its own permission; but while it stands, it is 'a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.' Its principles cannot, therefore, be set aside in order to meet the supposed necessities of great crises. 'No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy and despotism, but the theory of necessity on which it is based is false; for the government within the Constitution has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.'"

This judicious and comprehensive summary by an eminent judge is a fitting statement of the general principles established by the adjudications of the Supreme Court in a number of cases, and is fully sustained by the language of Chief Justice Waite in *United States v. Cruikshank*,² in which he says: "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States." And again: "Within the scope of

¹ Id., p. 33.

² 92 U. S. 542-51.

its powers as enumerated and defined it is supreme and above the States; but beyond, it has no existence."

§ 182. From these principles so clearly announced, we may venture to deduce certain canons of construction.

First. The interpretation must neither strain to enlarge or to diminish the powers of Congress, but by fair reason reach the mind of the Constitution of the United States.

Second. Congress has —

(a) Powers expressly granted. A large number of these are enumerated in the eighteenth clause of Article I, section 8, of the Constitution of the United States.

(b) Powers granted to it by clear implication from temporary or qualified negation of power to it. Thus, "the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808." In this clause the prohibition to the exercise of the power prior to a fixed time is a clear implication of the power to be exercised after that time.¹ Again: "The privilege of the right of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." This clause involves the implication of the power to suspend the privilege when such an exigency arises.² Other cases may be cited.³

(c) "The power to make all laws which are necessary and proper to carry into effect" the powers granted by Congress to the government of the United States, etc. This is the most difficult of construction, the difficulty arising out of the constitutional meaning of the two words "necessary" and "proper."

Mr. Hamilton and Mr. Madison have both commented upon this clause.⁴

Mr. Hamilton says: "What is a power but the ability or

¹ Const. U. S., Art. I, sec. 9, clause 1. ³ Id., clause 4; Art. IV, sec. 3, clause 1.

² Id., clause 2.

⁴ The Federalist, Nos. XXXIII, XLI.

faculty of doing a thing? What is the ability to do a thing but the power of employing the means necessary to its execution? What is a LEGISLATIVE power but a power to make LAWS? What is the power of laying and collecting taxes but a *legislative power*, or a power of *making laws* to lay and collect taxes? What are the proper means of executing such a power but necessary and proper laws? This simple train of inquiry furnishes us at once with the test of the true nature of the clause complained of. It conducts us to this palpable truth, that a power to lay and collect taxes must be a power to pass all laws *necessary* and *proper* for the execution of that power; and what does the unfortunate and calumniated provision in question do, more than declare the same truth, to wit: that the national legislature, to whom the power of laying and collecting taxes had been previously given, might, in the execution of that power, pass all laws *necessary* and *proper* to carry it into effect? I have applied these observations thus particularly to the power of taxation. But the same process will lead to the same result in relation to all other powers declared in the Constitution. And it is *expressly* to execute these powers that the sweeping clause, as it has been affectedly called, authorizes the national legislature to pass all *necessary* and *proper* laws. If there be any thing exceptionable it must be sought for in the specific powers, upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless."

This statement shows that this clause in the Constitution expresses nothing more than would have resulted from the grant of the enumerated powers to Congress without the insertion of the clause referred to. In other words, that there is an inevitable inference of power to adopt the means necessary to the execution of the expressly enumerated powers. If such inference of power were excluded, it would render nugatory the powers expressly granted, because the means

for executing them would be denied, though the powers themselves were granted. But great contention has arisen in political and forensic discussions and in the opinions of judges upon the meaning of the words "necessary and proper." Notably this contention was developed in the discussion of the *Legal Tender Cases*.¹

In *United States v. Fisher*,² Chief Justice Marshall said:

"In construing this clause" [the "necessary and proper" clause] "it would be incorrect and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.

"Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."

And in *M'Culloch v. Maryland*,³ he said to the same effect: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended; but we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people." And then he formulates the canon already quoted,⁴ "Let the end be legitimate," etc.

What then is the meaning of this word "necessary?" On the one hand a strict construction has been insisted

¹ *Hepburn v. Griswold*, 8 Wall. 603; *Knox v. Lee*, 12 id. 641-42; *Juilliard v. Greenman*, 110 U. S. 421.

² 2 Cr. 396.

³ 4 Wheat. 316.

⁴ § 195. See also the *Legal Tender Cases*, *supra*, and the opinions of the judges; *Juilliard v. Greenman*, 110 U. S. 421.

upon, based on the etymological meaning of the word, which would make it mean indispensable; a *sine qua non* to the principal power—a power in aid of the principal power lest it should cease to be.

It is obvious that the purpose of the power defined in these phrases is to make it coefficient to the expressly granted power; but in the execution of the principal power several means may be adequate for the purpose: *e.g.*, to collect duties; the designation of the officers who are to compose the machinery of collection may be involved; a discretionary choice between various forms of this machinery, either one of which would be adequate to the purposes, and therefore no one of which would be indispensable. It would result from this strict construction of the word “necessary” that, unless Congress could show that the machinery it finally selected was the only practical one, it could not be said to be indispensable, and therefore would not be necessary under this construction. It is obvious, therefore, that the word used in the Constitution to make the granted powers efficient would, by this interpretation of the phrase, not only fail to do so, but absolutely paralyze all the granted powers, and this is the reasoning of Chief Justice Marshall, above quoted.¹

On the other hand it is just as clear that there should be a close relation between the legislative means and the legislative end. The law necessary to carry into execution a principal power should be plainly ancillary to such power, and it should be enacted, because without it, or some like means, the principal power would cease to be. No means, so selected, should be for itself as an independent exercise of power, but should be selected *bona fide* by the legislative power as one of the indispensable methods by which the existence of the principal power should be preserved. It must not be enacted to accomplish an end not within the grant of powers, or adopted for some other purpose under the deceptive pretext of being a means to an execution of some granted

¹ United States v. Fisher, 2 Cr. 396.

powers. It must not be adopted for an illegitimate end in fraud of the Constitution and under cover of being selected as a means to the legitimate end of carrying out a power granted in the Constitution. This principle is very clearly involved in the decision of the Supreme Court in the case of *M'Culloch v. Maryland*, *supra*, where the chief justice says that the power to create a corporation "is never the end for which other powers are exercised, but a means by which other objects are accomplished. . . . The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is therefore perceived why it may not pass as incidental to those powers which are expressly given, *if it be a direct mode of executing them.*"¹

Again, speaking of the fact that the power to grant charters to corporations was not expressly enumerated, he adds: "Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it."

Again: "Should Congress in the execution of its powers adopt measures which are prohibited by the Constitution; or should Congress, under the *pretext* of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial

¹ *Accord*: Story on the Constitution, § 1257; 1 Hamilton's Works, 113-116, 130, 131, 136.

department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

These considerations lead to this conclusion. While on the one hand, in the interpretation of the word "necessary," we must not give it the meaning of absolutely indispensable, yet, on the other, it must be found to be one among many possible means which might be suggested for use, each and all of which are indispensable as means to the end of the execution of an expressly granted power; and on the other hand, it must be so construed that no legislation shall be adopted for its own sake, unless it be an expressly granted power which is not one among many possible means which is indispensable to the execution of a granted power. Congress cannot, therefore, be confined to all legislation which is the only, and therefore indispensable, means to the execution of power, but is excluded from all legislation which, though it might be selected as a means to carry out a granted power, is not selected for any such purpose, but is enacted as the *end* in view, unless that end be among the enumerated objects for Congressional legislation. It must be adopted *bona fide* as a means necessary to the execution of an express purpose, and not *mala fide* for the execution of the ancillary power, which is not within the legitimate and enumerated powers of the Constitution. It must be an ancillary power, and not the principal. So much for the meaning of the word "necessary."

§ 183. What is the meaning of the word "proper" in the phrase referred to? This word, which radically is derived from *prope* (near), and is associated with the family of names of which properly, appropriate, propriety, etc., are members, means that the legislation referred to must belong to, be fitted to, be plainly associated with, the powers to be carried into execution. The legislation must be appropriate; or, in the language of Judge Story, "it has a sense at once admonitory and directory. It requires that the means should be *bona fide* appropriate to the end."¹ This view is cited by Chief

¹Story on Const. of U. S., § 1248.

Justice Chase in *Hepburn v. Griswold*¹ and in the *Legal Tender Cases*.² This meaning of the word "proper" is involved in Chief Justice Marshall's canons already quoted, in which he says: "All means which are appropriate,—which are plainly adapted to that end,—which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

It must be observed that the legislation now under construction in aid of granted powers must be "necessary and proper," and however necessary any means proposed should seem to be in the opinion of Congress, it will not be constitutional unless it shall be proper. On the other hand, however appropriate it may be, unless it be a necessary means to effect the end, it will not be authorized by this clause. The two words together may therefore be interpreted as embraced in the canons of Chief Justice Marshall, *supra*.

1st. The nature of the employed power exercised as a means must be legitimate; in other words, no power will be employed as a means to any end which is not legitimate, that is, not within the powers granted by the Constitution. The ancillary legislation must be a necessary and proper means to accomplish an end which is clearly constitutional.

Thus Mr. Hamilton, while maintaining that Congress could create a bank to carry out the fiscal operations of the government, says: "The only question in any case must be, whether *it* (the corporation) be such an instrument or means to carry into execution any specified power, and have a natural relation to any of the acknowledged objects of government. Thus, Congress may not erect a corporation for superintending the police of the city of Philadelphia, because they have no authority to regulate the police of that city. But if they possessed the authority for regulating the police of such city, they might, unquestionably, create a corporation for that purpose." In other words, the power to create a corporation as a means to an end within the powers

¹ 8 Wall. 603.

² *Knox v. Lee*, 12 Wall., 457, *supra*.

of Congress was constitutional; to create it for means not within the powers of Congress was unconstitutional.¹

2d. But though the end be legitimate and be within the scope of the Constitution, no means are appropriate which are not plainly adapted to that end. The means must not only be adapted, but plainly adapted, to the constitutional end.

3d. No means are appropriate which are prohibited by the Constitution. The express prohibition condemns such a construction of those words; for how could the Constitution expressly condemn what in its view was "necessary and proper" to be done?

4th. No legislation can be proper which is inconsistent with the letter and spirit of the Constitution; hence the trial and conviction of Milligan to death by court-martial, though claimed to be a means for the preservation of the Union, was held unconstitutional, because such trial and conviction were forbidden by the Constitution;² and where, taking the whole Constitution in its distribution of powers between the departments of government, and the relation it establishes between the granted powers to the Federal government and the reserved powers to the States, the act is not in accord with the whole scheme, but inconsistent with it,—it is unconstitutional.³

5th. If Congressional legislation be inconsistent with the reserved rights of the States and their autonomy, it is unconstitutional.⁴

6th. If legislation be contrary to the trust nature of the power of Congress—that is, to the duty which Congress owes in respect to the subject-matter of the legislation to all the States, or to any one of them,—it would be contrary to the letter and spirit of the Constitution.⁵

7th. If the power be granted for one purpose, it is not

¹ 1 Hamilton's Works, 115-116, 130-31, 136.

³ *Collector v. Day*, 11 Wall. 113.

⁴ *Id.*

² *Milligan's Case*, 4 Wall. 2; 5th Amendment to Const. U. S.

⁵ *Dred Scott v. Sandford*, 19 How. 393, 448-52.

proper, and therefore unconstitutional, to exercise it for a purpose either forbidden, or not within the scope of its granted powers. This is a fraud upon the Constitution of the United States. It does by indirect what it cannot do by direct legislation, and operates upon a subject which is put beyond its reach by the Constitution itself. Judge Marshall in *Gibbons v. Ogden*,¹ speaking of the Federal power of taxation, said: "Congress is authorized to lay and collect taxes, etc.; to pay the debts and provide for the common defense and welfare of the United States. This does not interfere with the power of the States to tax for the support of their own government; nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other."

This shows distinctly that it is an unconstitutional exercise of the taxing power by Congress to use it for any purposes which are within the exclusive province of the States. It thus operates by indirection upon subjects reserved to the States, by exercising a power granted for one purpose to accomplish another, upon which it has no right to exercise jurisdiction. It is a fraud upon the Constitution of the United States by an indirect use of a granted power in order to pass the line of demarcation which the Constitution has prescribed between the granted and reserved powers. It is not "proper," for it is a means used by Congress to accomplish an end which is not legitimate because it is not within the scope of the Constitution.²

8th. Cases may arise where the power granted to Congress is exclusive; that is, the possession of the power by Congress is absolutely inconsistent with the exercise of the same power

¹9 Wheat. 1, 199.

²See Chief Justice Marshall's canon, *ante*, § 195; 4 Wheat. 416.

by the State. Thus Mr. Hamilton pointed out¹ that these exclusive grants to the Federal government might be either from the express term "exclusive legislation;"² or where the grant of power to Congress in one clause is followed by a prohibition of that power to the States; or where Congress has power to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy.³ In such cases the establishment of a uniform rule by Congress would exclude and annul the effect of any rule on those subjects enacted by the States.

This last class of cases of exclusive power in Congress has given rise to this contention: Does the existence of the power exclude the exercise of it by the States, or does the exercise of the power by Congress alone exclude State power? We shall note hereafter some nice distinctions on this subject. Thus, the power granted to Congress to lay taxes on any subject may be concurrently exercised by the States, except where it is forbidden to them.⁴

§ 184. And so we see Congress has power to provide for organizing the militia. The existence of this power does not exclude, unless Congress exercises it, the States from organizing their militia.⁵ But if Congress exercises its power, it is supreme and paramount to the law of the State. So as to the uniform law for bankruptcy. This does not exclude, it is said, the power of the States to pass bankrupt laws not impairing the obligation of a contract, unless Congress establishes an uniform rule of bankruptcy.⁶

Again, certain regulations of commerce, as the erection of light-houses and the like, which Congress may exercise, and thus exclude the States from inconsistent exercise, may,

¹ Federalist, No. XXXII.

⁵ *Houston v. Moore*, 5 Wheat. 1,

² Const. U. S., Art. I, sec. 8, clause 17.

21, 22.

17.

³ Const. U. S., Art. I, sec. 8, clause 7.

⁶ *Sturges v. Crowninshield*, 4

⁴ Federalist, No. XXXII; *Gibbons*

v. Ogden, 9 Wheat. 1, 198-9; *M'Culloch v. Maryland*, 4 id. 316-25.

Wheat. 122, 195-96; *Ogden v. Saunders*, 12 id. 213, 264-65.

if Congress does not exercise it, be exercised by the States; and so as to post-offices and post-roads. It would be absurd to say in either of these last two cases that the States could not protect their commerce by light-houses and the like, or organize a post-office department, if Congress refused to do either. The capacity to do, without the assertion by Congress of the power, cannot exclude the capacity of the States to do these acts.

At the same time, under this subject, two distinctions must be taken. Where the power of Congress and the power of the State is, in cases of concurrent powers, exercised on the same subject-matter, the paramount effect of the Congressional action must be conceded. But, on the other hand, Congressional and State power may be exercised on the same object, but not the same subject-matter, and, in any such cases, the concurrence of their powers will not conflict. Under the first of these an illustration may be presented: Congress and the States may tax, concurrently, for their diverse purposes, lands and other property. The powers do not conflict: that of Congress does not exclude that of the State.

Under the second head, where a State erects light-houses to protect its commerce, in the absence of exercise of such power by Congress, Congress may supersede and change such regulations by its paramount power to regulate commerce; the power of regulation, when in exercise, being inconsistent with and repugnant to a concurrent exercise by the State.

*Third.*¹ "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the

¹ See p. 365.

United States and of the several States, shall be bound by oath or affirmation to support this Constitution.”¹

This supremacy of the Constitution is given —

1st. Over the laws of Congress, which only become the supreme law of the land when “made in pursuance thereof.”

2d. Over the Constitution and laws of the States.

3d. Over treaties made, or which should be made, or caused to be made, under the authority of the United States — that is, under the authority delegated to the United States by the Constitution.

This supremacy is to be maintained through the judicial department of the States and of the United States, because it is declared that the judges in every State shall be bound thereby — that is, in their judicial action they must recognize the supremacy of the Constitution. And Federal and State judges are to be bound by oath to support this Constitution. Out of this arises the clearly-established doctrine throughout this country that every law of any State or of Congress, as well as every act of Federal officers inconsistent with the Constitution of the United States, is void.²

In the exercise of this great judicial function of determining, in respect to every right involved in any case, that the Constitution shall have paramount effect in respect to such right over any act or law of any department or officer of the State or Federal government, the court, State or Federal, exercises a clear judicial power and no more. It cannot repeal a legislative act, however repugnant to the Constitution, for such repeal would itself be a legislative function which the court cannot exercise. It simply adjudges that a law which is in conflict with the supreme law can have no effect, but must be adjudged null and void.

It will be perceived, however, that the court must take care, in the exercise of its judicial function, that the law in conflict with the Constitution has no effect, because it is no law at all; that it does not trench upon the legislative power by repealing a law which is valid because in pursuance of

¹ Const. U. S., Art. VI, clauses 2, 3.

² *Marbury v. Madison*, 1 Cr. 137.

the Constitution. If the court be in doubt whether a law be or be not in pursuance of the Constitution — where the repugnancy is not clear and beyond reasonable doubt,— it should refrain from making the law void in effect by its judgment, lest it should be really repealing a valid law by legislative act, instead of declaring it void by judicial act.

This delicate duty of the judicial department has led to the rule, now well established, that the court usurps legislative functions when it presumes to adjudge a law void where the repugnancy between the law and Constitution is not established beyond reasonable doubt. Its duty to refrain from legislative functions is paramount to its duty to declare the law void, because its jurisdiction to decide at all must be established before it undertakes to pronounce a decision.

“It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.”¹

“It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt.”²

It has already been shown that in considering these questions the judiciary defer to the legislative department in all cases where the latter’s action is left by the Constitution to its discretion as to the means it may adopt, or the determination of the circumstances under which the power is to be exercised, according to the circumstances and conditions prescribed for the exercise of the power in the Constitution; *e. g.*, suspension of the privilege of *habeas corpus*, and the like.

The same deference is shown to the discretion left to the

Fletcher v. Peck, 6 Cr. 128.

270; Trade-Mark Cases, 100 U. S.

²Ogden v. Saunders, 12 Wheat. 82, 96.

President in the exercise of executive functions; *e. g.*, the recognition of the belligerency or independence of a foreign State. Where the Constitution has confided to the legislative or executive department discretion as to time or circumstances precedent to their action, the courts leave to these departments the exclusive decision as to the exercise of the power.

§ 185. A singular class of cases remains to be mentioned. Suppose one part of an act be, in the judgment of the court, unconstitutional, will that induce the court to declare that other parts of the act, which are not unconstitutional, shall share the fate of annulment pronounced against the other? The rule seems to be, where the two clauses, the one unconstitutional and the other constitutional, are perfectly distinct and separable, the one may be adjudged null and the other stand; but if they are so connected and dependent on each other as to warrant the belief that the legislature held them to be dependent the one upon the other, intending all to stand or none, then the unconstitutionality of the one will infect the whole, and the entire act will be judicially held to be void.¹

The obligation of the Constitution on a judge in respect to his judicial functions is different from its obligation on a legislator or executive officer. Both are bound by oath to support the Constitution, but we have seen that the oath of the judge binds him to support the Constitution as to the prescribed limits of his jurisdiction as a precondition to his discharge of his function in declaring a law to be unconstitutional. His duty to do the latter depends upon whether his jurisdiction extends to it, and unless it clearly extends to it, in undertaking to decide on the unconstitutionality of a law he may pass the boundaries of his jurisdiction, and exercise the legislative power of repeal; therefore he cannot

¹ *Commonwealth v. Hitchings*, 5 Limitations, 178-79; *United States v. Gray*, 482, and other cases cited *v. Reese*, 92 U. S. 214; *Pollock v. Farmers' L. & T. Co.*, 158 *id.* 501, pp. 152-53; *Cooley on Constitutional* and cases therein cited.

declare a law void or unconstitutional unless for clear and undoubted repugnancy. The case is different with the legislator and the executive. He is bound to support the Constitution,—to uphold it as one of the pillars to an edifice. He is under the Constitution, not above it. He cannot support it by doing an act repugnant to it. “His public office is a public trust.” If he doubts his power to do under the authority of the Constitution, he is bound to resolve the doubt against the act, not in favor of it.

Mr. Cooley thus states it: “Legislators have their authority measured by the Constitution; they are chosen to do what it permits, and nothing more, and they take solemn oath to obey and support it. When they disregard its provisions they usurp authority, abuse their trust and violate the promises they have confirmed by an oath. To pass an act when they are in doubt whether it does not violate the Constitution is to treat as of no force the most imperative obligations any person can assume. . . . A witness in court who would treat his oath thus lightly, and affirm things of which he was in doubt, would be held a criminal. Indeed, it is because the legislature has applied the judgment of its members to the question of its authority to pass the proposed law, and has only passed it after being satisfied of the authority, that the judiciary waive their own doubts and give it their support.”¹

He holds the same views as to the duty of the President, and maintains that the President, even where the judiciary has sanctioned the constitutionality of an act, is not only not bound to give his approval to a similar act, but may, in consonance with his duty, withhold his approval.² It follows from this, that a legislator cannot justify a vote for a law on the ground that as judge he could not declare it void. The legislator crosses no forbidden line when he refuses to enact what he believes repugnant to the Constitution. The judiciary does cross a forbidden line where it declares a law

¹ Cooley on Constitutional Law, 153-54. ² *Id.* 161-63.

void, unless it be without doubt repugnant to the Constitution. The legislator is never warranted in voting for a law he does not believe the Constitution sanctions, to support which he has sworn as an affirmative duty, not that he will not pull down the pillars of the edifice, but, as one of the many pillars, he will uphold it.

In the case of the law-maker, the question to be asked is: "Have I a right under the Constitution to pass the act?" The *onus* is for him to show his authority. In the case of a judge, the question is: "Is the law clearly unconstitutional? In annulling the law in support of the Constitution will I transcend my judicial functions and usurp the legislative; or is the repugnancy so strong that I will only act judicially in annulling the effect of the law, and not transcend the boundary of my power?" The burden shifts in the two cases. The legislator must show that he has the right; the judge must show the legislator was clearly wrong.

Hence the law-maker may not justify a vote for a measure which as judge he could not declare void; but, if the judiciary declares such an act unconstitutional, it should forbid the law-maker to pass similar legislation. On the other hand, though the judiciary cannot declare a law unconstitutional because not clearly repugnant, it does not justify the law-maker in voting for it.

CHAPTER IX.

THE LEGISLATIVE DEPARTMENT.

§ 186. We come now to the consideration of the Constitution of the United States in its details.

The Preamble will be first considered. This, as it stands in the Constitution, was reported from the committee of style on the 12th of September.¹ In the original scheme of Mr. Pinckney, and in the report of the committee of detail, it did not have the words defining its objects.² As finally adopted it is in these words: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this *Constitution* for the United States of America."

In the scheme proposed by Mr. Randolph, however, it was "resolved, that the Articles of Confederation ought to be so corrected and enlarged as to accomplish the object proposed by their institution, viz.: common defense, security of liberty, and general welfare." This obviously referred to the third of these articles, which contained these words: "The said States hereby severally enter into a firm league of friendship with each other for their common defense, and security of their liberties, and their mutual and general welfare."

The meaning of the word "preamble" (Latin, *preambulare* — to walk before) is an introduction to the main subject, but no part of it. It may declare the purpose of enacting a law and the general scope of it, but it is "strictly speaking no part of it."³ "When the words of the enacting clause are

¹ Madison Papers, 1543.

² Id. 735, 1226.

³ *Rex v. Williams*, 1 W. Black. Rep. 95; 1 Kent, 461.

clear and positive, recourse must not be had to the preamble." And though the preamble is said by Lord Coke to be a key to the understanding of the statute, yet "the true meaning of the statute is generally and properly to be sought from the body of the act itself."¹

And so Judge Story says: "The preamble never can be resorted to, to enlarge the powers confided to the general government or any of its departments. It cannot confer any power *per se*. It can never amount, by implication, to an enlargement of any power expressly given. . . . Its true office is to expound the nature and extend an application of the powers actually conferred by the Constitution, and not substantively to create them."²

§ 187. Let us now analyze the terms of this preamble.

(a) The first few words taken with the last few words declare that "we, the people of the United States, do ordain and establish this Constitution for the United States of America." It declares the parties to the act of ordaining and establishing the Constitution, and for whom it was done. We have already sufficiently discussed this part of the preamble,³ and have shown that the declaration, in order to be consistent with the facts, must mean we, the people of each of the United States, by a convention thereof, did ratify and thus ordained and established the Constitution for itself and for such others, in all not less than nine, as should ratify the same in like convention.

(b) "In order to form a more perfect union." "The Articles of Confederation and perpetual union between the States" (naming all) had formed a confederacy which the first of the articles styled "The United States of America."

This preamble of the Constitution declares the purpose of that Constitution "to form a more perfect union,"—"a more perfect union" than the union established by those articles, but still a union as those created between the States.

¹ *Crespigny v. Wittennoon*, 4 Term Rep. 793; 1 Kent, 461.

² *Story's Constitution*, § 462.

³ *Ante*, § 123 *et seq.*

The two vices in the original Articles of Confederation have been so fully discussed¹ that a simple statement will serve our purpose now. The Articles of Confederation rested upon the consent of the legislatures — the delegated authority of the several States. This was removed by resting the new Constitution on the foundation of the consent of the sovereign people of each State — the delegating authority of powers to all governments. The union was, therefore, more perfect, because resting upon the most solid foundation known among men; that is, on the sovereignty itself, and not upon the delegated agent of sovereign powers.

The other vice was, that Congress under the Articles of Confederation had capacity to will, but no power to execute its own will. It was dependent for the execution of the powers with which it was vested upon the caprice of thirteen separate and distinct independent State legislatures. This great vice was removed by giving to the new Federal government the use of the means and instruments which its own legislation could devise for carrying into full and independent exercise the powers with which it was vested.

Again, the union was more perfect in the grant of larger powers to the Federal government, especially in respect to commerce, foreign and interstate. All these powers will be noted hereafter. It was more perfect in the constitution of an executive department independent of Congress, — the only executive authority existing under the Articles of Confederation being a committee appointed by Congress itself. It was more perfect in the constitution of a judicial department, clothed with judicial functions commensurate with the legislative and executive functions vested in Congress and the President, respectively. Under the Articles of Confederation there was no judicial power except in Congress itself, or transient commissions which Congress might create, and their power was only with respect to controversies between the States, with one apparent exception.

¹ *Ante*, § 133 *et seq.*

Moreover, the union was more perfect in the organization of the legislative department itself. Under the Confederation Congress was uni-cameral, composed of equipollent States, all of whose acts were passed by a vote of a majority of States, or by a vote of nine, without reference to the numbers of people in the States. Under the new Constitution Congress was bi-cameral. In one House, the States were represented in proportion to numbers; in the other, according to the equipollency of statehood; thus conserving the rights of numbers and the rights of States by requiring concurrence of both to action, and this concurrence which might produce injurious results was to be checked by the qualified negative of the President upon all legislative action. It may be comprehensively stated that in the distribution of powers and in the limitations upon the abuse of powers in the better demarcation of the delegated from the reserved powers, the Constitution ordained a more perfect union than that which had existed between the same States under the Articles of Confederation.

(c) "Establish justice." This obviously referred to provisions which prevented injustice between man and man, or between State and State, and the establishment of an efficient judiciary for the adjudication of rights.

Under the first branch may be mentioned provisions forbidding bills of attainder and *ex post facto* laws by Congress or by the States; the provisions forbidding the States to make anything but gold and silver coin a legal tender, and forbidding the passage of any act impairing the obligation of contracts and forbidding States to emit bills of credit. During the history of the Confederation great troubles had arisen through the laws of the States, which by these provisions were prohibited. All such laws were not only unjust, but produced great ill feeling throughout the Confederation.¹

But the chief meaning of these words was the establishment of the judicial department. During the period of the

¹Federalist, No. XLIV.

Confederation the treaties which Congress made were subject to adjudication by the courts of the several States, which made great diversity of decision upon the interpretation of those treaties, and the rights of foreigners under them. The United States were responsible to foreign nations for the observance of these treaties, and thirteen judicial tribunals had power to interpret them. How could justice be established in the midst of such confusion of decisions?¹ To produce uniformity of judgment upon which the United States might stand, the creation of a Federal judiciary was essential as a means of establishing justice. Again, suits by foreigners and suits by citizens of one State against those of another, questions of right between any parties arising under the stipulations of the Articles of Confederation, were necessarily finally to be adjudged in the court where the defendant resided. And so questions of prize, maritime laws and admiralty, in which other States and foreign countries were involved, must be finally adjudged in some one State. This gave rise to great ill feeling and heart-burning complaints of the injustice resulting from partial decisions due to the locality of the tribunal and the citizenship of parties.

To remove all these difficulties, and to give uniformity of decision as to questions arising under the laws of the Federal government and treaties made by its authority, and as to contracts and litigation between citizens of different States, etc., by submitting these questions to the judgment of some tribunal which was free from bias or prejudice, was an essential means of establishing justice.² These words, therefore, may be regarded as pointing especially to the class of cases herein referred to.³

(d) "Insure domestic tranquillity." This refers to two objects: the first expressed in the provision of the Constitu-

¹ Id., No. XXII.

474; *Penhallow v. Doane*, 3 id. 54;

² Id., No. LXX.

Jennings v. Carson, 4 Cr. 2; *Trevett*

³ *Story's Constitution*, §§ 482-86; *Chisholm v. Georgia*, 2 Dall. 419, Const. Law, 73; *Federalist*, No. VII.

tion¹ requiring the United States, on application of the State legislature or executive, to take measures against domestic violence, and to guarantee to each State a republican form of government; thus securing against conflicting rivalry, and securing uniformity of State governments in the family of States. Analogous to this, is the greater power of the States in union to suppress insurrection in any one.²

But the other great object indicated by these words, most prominent in the minds of the framers of the Constitution, was the effect of union in preventing interstate wars. If the States were disunited, the danger of constant war between them cannot be overlooked. And this danger would be enhanced from the peril of intervention by foreign nations, who would be interested to alienate them, and by the separate relation of each State to foreign countries multiply the occasions of war with them, separately and with them in union, in the proportion of the numbers of the States to one.

The assurance of domestic tranquillity, therefore, to all the States *inter se* and against foreign nations, by their forming a more perfect union, was expressed with great force by the authors of the *Federalist*.³ A perusal of these papers, which cannot well be condensed, will fully repay the reader. In No. VI, Mr. Hamilton quotes a passage from Abbé de Mably which is worthy of insertion. "Neighboring nations are naturally enemies of each other, unless their common weakness forces them to league in a *Confederative Republic*, and their Constitution prevents the differences that neighborhood occasions, extinguishing that secret jealousy, which disposes all States to aggrandize themselves at the expense of their neighbors." Mr. Hamilton adds: "This passage, at the same time, points out the *evil*, and suggests the remedy," of a *Confederative Republic*.

¹ Art. IV, sec. 4.

³ Id., Nos. VI, IX, X, XII.

² *Federalist*, Nos. VI, VII, IX, X,
XII.

(e) "Provide for the common defense." This requires but a word. This was one of the prominent purposes of the Articles of Confederation. Congress had power given to it, with money and men, to accomplish the object, but it had neither means to raise money or men, except through a dependent requisition on the States. The Constitution was ordained to "provide for the common defense"—that is, the defense of each and all of the States,—to protect each State against invasion,¹ and it gave independent power to the United States to raise revenue and to raise and support armies. As already shown, this was an element in the more perfect union which the Constitution formed. The common defense, or the defense of each, was thus assured by the combined power of all, instead of resting upon the power of any one if disunited from the others.²

(f) "Promote the general welfare." The authors of the *Federalist* have very well shown that the general welfare of all the States is promoted by the comparative inexpensiveness of a common government for those concerns of each in which each is involved. Foreign intercourse through a single government acting for all, instead of each government acting in these respects for itself alone, would better promote the general welfare. The word "general" excludes the idea that the Constitution was ordained to promote the welfare of each, and therefore the common welfare of all. The general welfare relates only to those influences which belong to the welfare of all taken as a whole, and excludes those things which belong to each taken separately. This obviously relates to the regulation of commerce with foreign nations, and of interstate commerce; to a uniform coinage of money, to the postal system, to uniform naturalization and bankruptcy, copyright, patents, to treaties with foreign nations. In all of these, each State has merged its separate function, through its own distinct government, into a general function, through a common agent, and the gen-

¹ Const. U. S., Art. IV, sec. 4

² *Federalist*, Nos. XI, XXIV, XXV.

eral government of all. It is very obvious that, in reference to all these matters, each State in separate action would be the rival of every other, and in the conflicting rivalries of all, the injury, if not ruin, of the welfare of all would be inevitable. But the constitution of a general agent to act for each and all suppresses injurious rivalry and invites a common policy, which permits the promotion of the general welfare of all the States. Without dwelling further upon this, reference may be had to the *Federalist*.¹

(g) "To secure the blessings of liberty to ourselves and our posterity." Several points may be suggested under this head.

(1) The division of the powers of government between two distinct (and rival) systems of government prevents the centralization of power, which is so fatal to liberty; and especially is this the case where the two systems of government will be disposed to watch each other, lest usurpation will disturb the balance of power between them.

(2) In separation, the States of America would, like the States of Europe, be compelled to keep large standing armies for protection against their neighbors; but such an army may, by an ambitious ruler, be converted from a shield against foreign invasion into a sword for the destruction of liberty.² Standing armies have always been perils to liberty. The union avoids the need of such for interstate defense, and with our isolation from powerful foreign nations, there is no need of a standing army for protection against foreign foes.

(3) The preservation of the integrity of the State governments avoids jealousy of Federal usurpation against the liberties of the people on the part of the States. The power of commanding the militia force in defense of liberty on the one hand, and the guarantee by the United States of a republican form of government to each State against usurpers

¹ *Federalist*, Nos. XII, XIII, XIV, XXVII; Story on the Constitution, §§ 496, 505.

² *Federalist*, Nos. VI, VII, VIII.

in the State itself on the other hand, present two powerful forces in antagonism, which may be used by the people for the defense of their liberties against assaults upon them from other States.¹

(4) The distribution of power between the departments of the Federal government under the strict limitations which the Constitution fixes for the exercise of Federal power, fully conserved by the judicial power to protect the Constitution against violation by either of the other departments, with the strict limitations of Federal and State power in matters which concern the liberty of the citizen, make this declared object named in the preamble a very fitting close to its statement of the general scope of the Constitution ordained by the people.²

THE THREE DEPARTMENTS OF THE FEDERAL GOVERNMENT.

§ 188. The separation and independence of the Legislative, Executive and Judicial departments present for consideration the essential importance of such a structure of government. Baron de Montesquieu in his remarkable work, "The Spirit of Laws," laid down certain propositions on this subject, which had great weight with the revolutionary fathers in the construction of their various bills of rights and State Constitutions, as well as the Constitution of the United States.

So great was the influence of this author that a distinguished writer has declared that "neither the institution of a supreme court, nor the entire structure of the Constitution of the United States, were the least likely to occur to anybody's mind before the publication of the 'Spirit of Laws.'" ³

Without assenting to this statement in all of its breadth, it is unquestionable that this work of Montesquieu, pub-

¹ Id., Nos. XXVIII and XLVI, by Madison and Hamilton.

³ Maine, Popular Government, 218.

² Id., Nos. XVII, XXX, XXXIX, XLV, XLVI

lished in 1748, had a great influence upon the structure of our constitutional system. He was a great admirer of the English government, and his principles were adopted largely in view of its constitutional system. The whole passage bearing upon this point is here inserted.

“In every government there are three sorts of power: the legislative; the executive, in respect to things dependent on the law of nations; and the executive, in regard to matters that depend on the civil law. By virtue of the first the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security and provides against invasions. By the third, he punishes criminals or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the State. . . . When the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers — that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”¹

The influence of Montesquieu's maxim upon the Federal Constitution is not left to conjecture. Mr. Madison discusses this subject at length in the *Federalist*,² and vindicates

¹Spirit of Laws, Bk. XI, ch. 6, p. 173. ²Nos. XLVII, LI.

the Federal Constitution against any material violation of the maxim. To see how far the Federal Constitution conforms to Montesquieu's maxim, a few observations will be proper.

1st. The separation of the three departments, and of the powers to be exercised by each, is clearly defined in Articles I, II and III of the Constitution.

2d. "No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time." This prevents the appointment by the executive to any civil office of any legislator, who, as such, has created the office or increased its emoluments.¹

3d. "And no person holding any office under the United States, shall be a member of either House during his continuance in office."² This excludes all civil officers (including President and judge) from being members of either branch of Congress.

In certain other respects Montesquieu's maxim has not been observed in the Constitution. Thus, the House of Representatives has the sole power of impeachment.³ And the Senate shall have the sole power to try all impeachments.⁴ Again, the executive has a qualified veto upon every bill passed by both Houses of Congress; and the President, with the consent of the Senate, has the power of appointing all the judges.⁵

While the provision already cited⁶ excludes all judicial and executive officers of the United States from being members of Congress, there is nowhere in the Constitution any provision which excludes a judicial officer from being President, Vice-President, cabinet minister or ambassador, or other of-

¹ Const. U. S., Art. I, sec. 6, clause 2.

² Id.

³ Id., Art. I, sec. 2, clause 5.

⁴ Id., Art. I, sec. 3, clause 6.

⁵ Id., Art. I, sec. 7, clauses 2 and 3.

⁶ Id., Art. I, sec. 6, clause 2.

ficer; hence it happened that Mr. Jay was, while holding the position of Chief Justice, Secretary of State also, and was appointed Minister to England, where he negotiated the celebrated treaty which bears his name. Chief Justice Ellsworth was Minister to France while holding his judicial position; and Chief Justice Marshall, whose commission was dated January 31, 1801, and who presided in the Supreme Court during the next month, retained his place as Secretary of State during the latter period, discharging the duties of both offices at the same time.

This union of the judicial with the executive functions was *casus omissus* in the deliberations upon the Constitution, and is a clear departure, and in an important respect, from Montesquieu's maxim.¹

THE LEGISLATIVE DEPARTMENT.

§ 189. Article I, section 1. "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

(a) This is the exclusive investment of all legislative powers in Congress. No such powers granted in the Constitution can be exercised by any other than Congress.

(b) There is vested in Congress all legislative powers *herein granted*; such powers are imperatively limited to Congress. Considering this clause with the tenth article of Amendments, that the powers not delegated to the United States by the Constitution are reserved to the States respectively, or to the people, we are led to this proposition: affirmatively, all legislative powers granted or delegated are vested in Congress; and negatively, all legislative powers not granted or delegated are reserved to the States or the people, and are therefore not vested in Congress; so that no powers are vested in Congress but those delegated by the Constitution, and therefore granted.

¹ Carson's Supreme Court of the United States, p. 192, and note 3.

(c) This clearly excludes all idea of powers inherent in Congress, or any others than those delegated by the Constitution.

(d) Congress shall consist of a Senate and House of Representatives. The history of the struggle in the Federal convention, by which a bi-cameral Congress was organized in the manner fixed by the Constitution, has been fully stated and need not be repeated. And so much has been said in favor of the bi-cameral over the uni-cameral legislative body in a former part of this work on the general principles of government and of its importance in the Constitution of our Federal system, that we may dismiss this clause without further comment.¹

§ 190. "The House of Representatives shall be composed of members chosen every second year." Any representative popular government must be fairly responsible to the people. In the early history of the House of Commons that House sat every year, but were not elected every year; then it was elected every third year and now every seventh year, unless sooner dissolved. The period for these successive elections might be extended or contracted indefinitely. The Constitution deemed biennial elections a fair medium. The term ought not to be so long as to create in the representative a sense of irresponsibility to popular will; nor, on the other hand, so short as to subject the deliberate action of the representative to popular caprice and destroy in him the independence of sober deliberation so essential to the wisdom of legislative action. Besides, the extent of the country, the grave and important problems to be submitted to the legislature of a union consisting of so many States, would induce the lengthening of the period of service to a point which would not destroy the sense of responsibility. Two years would accomplish both of these results. It would give to the representative a particular sense of responsibility and time for study of the subject upon which he is to act.²

(b) By whom chosen? "By the people of the several

¹ *Ante*, ch. III.

² *Federalist*, Nos. LII, LIII.

States." The people of each State constitute the elective body for the representative.

(c) Who shall vote? "The electors (voters) in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." As the representatives are, as we have shown,¹ representatives of the States according to their respective numbers, and are to be elected by the people of the several States, it is obvious that the people of the State should designate the voters who should voice its will. It was therefore out of the question that the Constitution should fix the right of suffrage for these elections, and *a fortiori* that Congress should have the power to do so, and hence the right of suffrage was accorded to those whom the Constitution of the State, for the time being, qualified to vote for the most numerous branch of the State legislature. As the qualification of suffrage for the two branches of the legislature of many of the States at that time was different, that for the most numerous branch being the most liberal, it was agreed by the States ratifying the Constitution, that the Constitution of each State, in designating voters for the most numerous branch of its own legislature, should designate the same for the most numerous and popular branch of Congress. The exclusive power in fixing suffrage for the House of Representatives is in the State, and the other States as parties to the Constitution agreed that the action of the State as to its own government should be the rule for the Federal Congress.²

§ 191. Article I, section 2, clause 2. Who may be elected a representative?

(a) He must have attained to the age of twenty-five years.

(b) And have been seven years a citizen of the United States. This would make each native citizen of a State eligible, and every alien who had been a naturalized citizen for seven years.

(c) And when elected he must be an inhabitant of that State in which he shall be chosen. This inhabitancy or dom-

¹ *Ante*, § 175.

² *Federalist*, No. LII.

icile of the person in the State which chooses him was to exclude all who, by non-inhabitaney, might secure an election, when, by reason of no community of interest with the constituency, he would be unfit to represent it.

(d) The question has been mooted whether the State legislatures can prescribe qualifications other than those contained in the Constitution of the United States. Clearly not. The Constitution intended that the representatives of all the States — a question in which all were interested — should be equal, and for any one to disturb the equality so established would be contrary to the rights of the others, besides admitting that the people of the State might make such a change. The power of the State legislature to do so is neither recognized by grant or by reservation, nor can the Congress or the House change these qualifications. To the latter no such power was delegated, and the assumption of it would be dangerous as invading a right which belonged to the constituent body and not to the body of which the representative of such constituency was a member. Nor could it be claimed as reserved to the people of the State, for the structure of the House was a matter of compact between the States, in respect to which no State could have had any pre-existing power, and therefore none could be reserved to it.¹

§ 192. Article I, section 2, clause 3. "Representatives and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."

(a) This clause has been already considered.² There had been in the discussion of the Articles of Confederation in the Continental Congress a question raised whether the quota of contribution of each State to the common treasury

¹4 Jefferson's Correspondence, 238; Story on the Constitution, secs. 623-28. ² *Ante*, § 183.

of the Union should be based upon population or upon the value of land. Land value was adopted as the basis in the eighth of those Articles. Congress had proposed, April 18, 1783, to change the Articles so as to base the quotas of the States on all the free population of each, and three-fifths of the slaves, but this proposition was never adopted.¹ This basis for representation and for direct taxes was reported by the committee of detail, August 6, 1787, to the convention.² Enough has been said on this subject in stating how this compromise was adopted in reference to representation and taxation.³ Three-fifths of the slaves were counted for representation as well as for the quota of direct taxation.

(b) "The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years." This provision for a decennial census was to change the ratio of representation and taxation according to the changes in population in the several States.

(c) "The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative." This limitation as to the constituency for a representative was to prevent the House from becoming too numerous. This clause was very much opposed for fear the House would be too small to be a fair representative of popular sentiment; but the answer to this was that, with the great increase of population which all anticipated, a full representation of the popular will, based upon the idea of even as small a constituency as 30,000, would be too numerous to make it a deliberative body. On that basis the House of Representatives, at present, would have over 2,000 members, to which the language of Mr. Madison would be applicable: "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."⁴

On the other hand, to the objection that one for every

¹ 8 Journals of Congress.

² Madison Papers, 1227-28, 1233.

³ *Ante*, § 183 *et seq.*

⁴ Federalist, No. LV.

180,000 is too small a representation to be adequate to such a constituency, the answer is that the genius of our Constitution, which gives to such representative no jurisdiction over the concerns of the other constituency which do not relate to the common defense and general welfare of the great territorial empire, if strictly adhered to, will save the rights of the constituency from wrong doing by the representative.¹ It is especially noteworthy that, irrespective of population, each State must have at least one representative. This saved to the State, however small, its voice in the House as due to its statehood and despite its numbers.

(d) "And until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight," etc., etc.

The effect of this basis of representation upon the relative weight of the Northern and Southern States is a matter of historic interest. Taking the first census of 1790, it will be found that the seven Northern States — New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey and Pennsylvania — had 1,882,615 inhabitants. The six Southern States — Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia — had a population of 1,961,174. If population, free and slave, therefore had been counted as the basis for representation, the six Southern States would have had a majority in the House of Representatives; but the number of slaves was 697,681, and two-fifths of these were lost in the ratio of representation. But the Northern States had slaves as well as the South. The South lost from the deduction of two-fifths of slaves 262,930, which deducted from the total population above given left her representative population at 1,698,244. The North lost from the deduction of two-fifths of her slaves 15,579, which deducted from the total Northern population above given left her a representative population of 1,867,036.

The actual representation of the Northern and Southern States prior to the census was arbitrarily fixed, so that the

¹Id., Nos. LV, LVIII

North had thirty-five and the South thirty representatives. The North had more than its due proportion.

(e) Under clause (a) of this section we note that it gives to each State its representation based on relative numbers.

A practical difficulty has arisen in the interpretation of this clause. Direct taxes may be strictly apportioned according to the census returns of the population of each State, but it is obviously not so in reference to representation; for no matter what number be adopted as the ratio of representation, that will not be a common divisor to the numbers in each State without leaving a remainder. Accordingly, the first bill for apportionment representation that passed was vetoed by President Washington; the reasons for and against it are stated by Judge Story.¹ This question has been discussed at every re-apportionment upon a recurring census, and is a question which depends so much on all the circumstances of the case that a further reference to it would be unimportant. The reports of the committees of the two Houses of Congress in the later censuses may be referred to for the practical difficulties which have arisen, and the approximate methods adopted for their solution.

§ 193. Article I, section 2, clause 4. "When vacancies happen in the representation from any State, the Executive authority thereof shall issue writs of election to fill such vacancies.—The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment."

There was not much debate on this provision, but its language is important. The vacancies spoken of are "in the representation from any State." This confirms the view that the members of the House of Representatives are representatives of the several States; accordingly it was natural and proper that when the representation from the State was in-

¹Story on the Constitution, secs. 675-81, citing 4 Jefferson's Correspondence, 466; 5 Marshall's Washington, ch. 5, p. 324, and note; Mr. Jefferson's opinion and Mr. Webster's report in 1832; Story on the Constitution, sec. 681, and note 2.

complete by reason of a vacancy, the authority of the State should be exercised to supply the deficiency; and as the legislature of the State would not always be in session, the executive power of the State was selected as that which should issue writs for new elections to supply the vacancy.¹

In Great Britain the House of Commons elect their own speaker, subject to the approval of the crown; although, at present, this approval of the crown is more formal than real, yet the Federal Constitution gave the exclusive power to the House without any reference to the executive. The provision for the House of Commons was due to the prerogative of the crown, which demanded that the organ of the House of Commons should be agreeable to the king.² But no such prerogative belongs to the President elected to the executive department of the Federal government, and an approval by him would give an intrusive influence to the executive department in the conduct of the business of the House utterly inconsistent with the whole character of the system. The autonomy of the House could only be effectual where the selection of its speaker and other officers was exclusively vested in the House.

The House has the sole power of impeachment. An impeachment is a presentment, or indictment, by the House of any officer of the government for official crimes and misdemeanors; and as there is no limitation in the grant as to the number of the members of the House who shall concur in impeachment, it results that the impeachment may be made by the House—that is, by a majority of those voting upon the question. This power to impeach is simply the power to accuse, and is different from the jurisdiction to try, which, as we shall see hereafter, is a function reposed in the Senate.³ This power of impeachment subjects all the officers of the government to the investigation of the representatives of the people of the States, and qualifies the otherwise independent

¹Story on the Constitution, sec. 683.

³Story on the Constitution, secs. 685, 686; Rawle on the Constitution, ch. 22; 2 Woodeson's Lectures, 40.

²1 Blackstone's Comm. 181; Story on the Constitution, sec. 685.

tenure of their offices, by subjecting them to impeachment for high crimes and misdemeanors.¹

§ 194. Article I, section 3. "The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years, and each senator shall have one vote."

(a) In this body, as we have shown previously, the equipollency of the States is secured as a part of the compromise made in the convention between the large and small States,—the commercial and agricultural States.²

(b) We have seen how the diverse constitutions of the two Houses requiring a concurrent majority of the representatives of the States selected in the one House according to numbers, and in the other according to equipollency of statehood, thus became an important and a most valuable check upon partial and selfish legislation, as well as upon hostile and inconsiderate action. The structure of Congress, composed of two houses upon diverse bases of constituent strength, is a splendid example of the wisdom of the framers of the Constitution in obstructing inconsiderate, partial and unjust legislation.

(c) The mode of appointment of the senators was intended not only to connect this branch of the government of the United States directly with the legislative branch of the government of the States, but to secure the integrity of the governmental organism of the States against hostile action by the government of the United States, by making the legislature of each State a constituency of the Senate of the United States. It secured forever the indestructibility of the governments of the States, by making the existence of the government of the United States dependent upon the continued existence of the legislatures of the States. If the Federal Samson should attempt to pull down the legislative system it would involve in a common ruin Samson himself; so that the existence of the Federal government was itself a guarantee of the perpetuity of the State governments.³

(d) Whether the two houses of which a State legislature

¹ See *post*, Art. I, sec. 3, clause 7, and Art. II, sec. 4.

² See *ante*, § 182.

³ Federalist, Nos. XXVII, LXII.

may be composed shall elect the senator by joint ballot, or shall elect him by the concurrence of the two separate branches, is not determined by the language of the Constitution. Ordinarily in practice it has been made by the joint ballot of the two houses. Whether this be within the meaning of a subsequent clause of the Constitution prescribing the manner of holding elections of senators, we will consider hereafter.¹

(e) The number of senators from each State was intended to be small in order to make it more select and better fitted for quiet deliberation. In 1803 Judge Tucker estimated that the Senate would never exceed fifty in number.² This was after the acquisition of Louisiana, which included the five Northwestern States. To have allowed a State less than two representatives would have involved the probability, from the temporary absence of the one senator, of the want of any representation of some one State at an important crisis. Two were therefore given to each State to secure its presence by at least one senator in most cases, and not more than two in any event, to prevent the body becoming too large. The number three was rejected by a vote of nine States against one, and two was inserted by a vote of nine States against one.³ Our later experience will justify the wisdom of both votes.

(f) The term for senators was obviously enlarged in order to give to the Senate a longer period of experience in the discharge of its important functions, and a longer term of irresponsibility to the popular will in order to ensure independence of popular caprice. Six years was adopted as a compromise between the extreme view of Mr. Hamilton, which favored a tenure during good behavior (in effect, for life), and as short a term as three years.⁴ Seven years was

¹ *Post*, Const. U. S., Art. I, sec. 4; considered by him in these pages.—
Rawle on the Constitution, 37; EDITOR.]
Kent's Comm., Lecture II. [The
consideration of this section (Art. I,
§ 4) was temporarily omitted by the
author when it was reached, and
owing to his death was never con-

² 1 Tucker's Blackstone, Appen., 223.

³ Journal of Convention, 189.

⁴ *Id.* 118, 130, 147-48.

that which ultimately prevailed, but was abandoned for the present plan of a term for six years, with the addition that one-third should go out biennially.

The plan finally adopted was a compromise by which, while each senator was not made responsive by requiring a new election except at the end of six years, yet the influence of a change in public sentiment and the infusion into the Senate as a whole of a changed public sentiment was secured by requiring one-third of the senators to be elected every three years. The jealousy of a legislative body elected in all its membership for a fixed term of six years, due to its being non-responsive to popular sentiment during all that period, was allayed by making one-third of the senators subject to a new election at the end of every two years; and thus the constitution of the body united the two objects in view in constructing such a representative body as to make it independently deliberative, and yet not wholly irresponsible to public opinion.¹ The length of the term insured a larger knowledge to the senator by experience in the discharge of his duties, while the responsibility of one-third of their number to the popular will made it largely responsive in its action to the popular influence.²

The potential reason for the length of the term of the senators is the function devolved on that body in respect to treaties with foreign powers. This function requires time and experience to enable him who discharges it properly to do so. An ephemeral body would not be well adapted to this; length of service was deemed essential to it.³ The term of service of representative and senator, therefore, taken together may be regarded as a wise discrimination. The House of Representatives is sensitively responsible to public opinion by reason of its short term of two years. The Senate is intended to be less sensitive to the rapidly changing sentiments of the people, but sufficiently so to check, by greater deliberation, the action of the House, and making

¹ 1 Tucker's Blackstone, Appen., 196; Federalist, No. LXIII.

² Id.

³ Federalist, Nos. LXII, LXIII.

both bodies, by the requirement of concurrence in order to action, a true or conservative reflex of the popular will.

The modification of the term of service, to which we have referred, is found in the second clause of section 3. This provides that, upon the first assembling of the Senate, "they shall be divided as equally as may be into three classes;" the term of the senators of the first class shall be vacated at the expiration of the second year; of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, "so that one-third may be chosen every second year." This division was made at the first session of Congress in the following manner:

"The senators present were divided into three classes by name, the first consisting of six persons, the second of seven, and the third of six. Three papers of an equal size, numbered one, two and three, were, by the secretary, rolled up and put in a box and drawn by a committee of three persons, chosen for the purpose in behalf of the respective classes in which each of them was placed; and the classes were to vacate their seats in the Senate according to the order of the numbers drawn for them, beginning with number one. It was also provided that, when senators should take their seats from States which had not then appointed senators, they should be placed by lot in the foregoing classes, but in such a manner as should keep the classes as nearly equal as possible. In arranging the original classes care was taken that both senators from the same State should not be in the same class, so that there never should be a vacancy, at the same time, of the seats of both senators."¹

(h) The clause then proceeds: "If vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies." In *Lanman's Case* the Senate decided that the executive could not appoint one to fill a vacancy which had not already occurred, and the executive was

¹ Story on the Constitution, sec. 724; Journal of the Senate, May 15, 1789, pp. 25, 26.

to wait the expiration of the term of the incumbent before he could do so.¹ It will be perceived that the power of the State executive to appoint, only exists when the legislature is not in session, and the term of the appointee only continues until the next meeting of the legislature. The phrase "until the next meeting of the legislature" has been construed to mean that such appointee shall hold, not up to the first or any other day of the session, but during the whole period to the time when the legislature fills the vacancy, or if it does not, until the close of the session during which it could do so. If the legislature adjourns without electing, the temporary appointment ceases and the power of the executive to make one is at an end.² A question has arisen, whether if the legislature fails, for any reason, to elect a senator and adjourns without doing so, the executive has power to fill it. Is it a vacancy which happens during the recess of the legislature of the State? Did not the Constitution, by using the word "resignation" in connection with the words "or otherwise," contemplate an incumbency which ceases by resignation, death or some other circumstance, or did it contemplate a vacancy in the office resulting from the legislature never having chosen persons to fill it? The better opinion would seem to be, that where the term has never been filled it is a vacancy in the office by non-exercise of the elective function by the legislature, which function the executive is not competent to perform. The executive power is only called into exercise where the legislature, by reason of the happening of the vacancy, has had no opportunity to exercise its original function of electing. This executive power is never to be exercised where the legislature has had the opportunity to elect, but declines to do so. There may be reasons why it should so decline, and if so, it would be out of place for the executive to elect, where the legislature has deliberately declined to exercise the power.

¹Cushing's Law and Practice, sec. 494; Senate Report, 2d Sess. 55th Cong., on Corbett's case, and precedents there cited. ²Story on the Constitution, sec. 725, and note.

§ 195. Article I, section 3, clause 3. "No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen."

(a) The qualification of age for senators is five years more than for representatives, and two years more for citizenship. This indicated the constitutional purpose to require larger experience and a longer period after naturalization of foreign-born citizens than in the case of representatives. The relations of the Senate to the treaty-making power and to appointments for offices, and to the judicial trial of impeachments, made the framers of the Constitution require greater maturity for the members of the Senate than for the members of the House.¹

(b) The clause as to the inhabitancy of the State for which the senator is chosen grew out of the necessity of the representative being in accord and sympathy with the interests of his constituents. "The only surprise is that provision was not made for his ceasing to represent the State in the Senate as soon as he should cease to be an inhabitant."² The reason for this may have been the difficulty of determining what would be necessary to constitute such a change, and the tribunal that should decide it.

(c) The question of the mode of election of senators has been the subject of consideration in Congress within the last few years, and an amendment has been offered for several sessions in the House of Representatives, and has passed that House by the requisite two-thirds vote, for electing the senators by the popular vote of the suffragans of the State. The reasons for and against this proposition will be found in the Congressional debates upon the proposition.³ It is hardly proper in a work devoted to consideration of the Constitution as it is, to discuss the propriety of proposed amendments

¹ Federalist, No. LXII; Rawle on the Constitution, 37; 1 Tucker's Blackstone, Appen., 223; Story on the Constitution, secs. 726-28.

² Story on the Constitution, sec. 729.

³ See Report No. 944, H. R., 53d Cong., 2d Sess. The joint resolution

until they shall have been finally acted upon. But it may be remarked that the proposition indicates a drift of public sentiment in favor of a direct relation of the senator to the people of the State, rather than to the legislative organism of the State; for often a majority of voters in the State would select a senator different from the one a majority of the legislature might choose. Whether the relation of the governmental organism of a State to the Senate as a branch of the Federal legislature — to which importance is attributed by some — is a question of grave import, may well be doubted.

§ 196. Article I, section 3, clause 4. "The Vice-President of the United States shall be president of the Senate, but shall have no vote unless they be equally divided."

(a) In the convention of 1787 the question as to the presiding officer of the Senate was debated. At first the Senate was authorized to choose its own president, as in the case of the House of Representatives, and this was at one time during the convention adopted, together with the provision that the president of the Senate, in case of the removal, death, resignation or disability of the President of the United States, should discharge the duties of the President.¹ Subsequently the office of Vice-President was determined on, and by a decided vote of eight States to two he was made the presiding officer of the Senate.² Objections were afterwards made in some of the State conventions to the selection of an officer not elected as senator to preside over the deliberations of the Senate and to cast a potential vote upon any measure where there was a tie in the Senate, but it prevailed by the ratification of all the States.³

(b) In exercising the duty of the presiding officer the Vice-

proposing an amendment to the Constitution on this subject recommended in said report passed the House of Representatives July 12, 1892, and identically the same resolution passed the House on the 20th of July, 1894. A similar joint resolution was passed through the

House during the second session of the Fifty-fifth Congress.

¹ Journal of Convention, pp. 218, 225-26, 240.

² Id., pp. 325, 339.

³ 2 Elliott's Debates, 359, 361; 3 Id. 37, 38; 1 Tucker's Blackstone, 199, 200, 224; Story on the Constitution, secs. 733-38.

President's power came in question during the Presidency of John Quincy Adams — Vice-President Calhoun holding that he could not of his own motion call any member to order unless, by the rules of the Senate, he was authorized to do so. This view was opposed by the President himself, as was supposed, over the signature of Patrick Henry, Mr. Calhoun writing over the signature of Onslow.¹ The Senate made a rule in 1828 that every question of order should be decided by the president, without debate, subject to appeal to the Senate.²

§ 197. Article I, section 3, clause 5. "The Senate shall choose their other officers" (as to which comment is unnecessary), "and also a president *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States."

(a) It has become a practice for the Vice-President to vacate his seat a short time before the end of the session, in order that the Senate may choose a president *pro tempore*, who would thus be in office to preside at the next session if the Vice-President, in the recess, should be called to the Presidency.³

(b) It may be well to note that the clause seems to indicate that the Vice-President fills the office of President in case of his death, and does not merely discharge the duties of the office, and that whether present or absent the president *pro tempore* will preside when the Vice-President becomes President. The structure of the sentence would indicate this construction, which is the more rational, because otherwise the President of the United States, by reason of having been elected Vice-President, might take part in the deliberations of a branch of the Congress; and this construction is more clearly established when the Vice-President alone can preside over the Senate, since by becoming President he will cease to be Vice-President.

¹ See 6 Works of Calhoun, 322.

³ Story on the Constitution, sec.

² Story on the Constitution, secs. 737, 738; Cushing's Law and Practice, 289.

§ 198. Article I, section 3, clause 6. "The Senate shall have the sole power to try all impeachments."

(a) We have seen that the sole power of impeachment is vested in the House of Representatives. The accusing power is in the House; the judicial power is in the Senate. The discussion of the question of the propriety of vesting this power in the Senate may be found in the *Federalist*,¹ and in the works of other commentators on the Constitution.²

(b) In the convention, the question of giving the trial of impeachments to the Supreme Court was fully considered. The reasons for not vesting it in the Supreme Court are stated in the *Federalist*,³ and the answer to it by a Virginia commentator.⁴ Judge Story maintains the propriety of not vesting this power in the Supreme Court quite elaborately.⁵ Mr. Rawle, in his work on the Constitution, sanctions the proposed grant of this power to the Senate as eminently wise. Since the publication of the works of the eminent authorities referred to, there have been some trials for impeachment that excited great interest. These were the trial of President Johnson in 1868, which resulted in his acquittal by the lack of one vote to make two-thirds of the senators present, and the trial of Secretary Belknap, which resulted in acquittal, chiefly, perhaps, because by the acceptance of his resignation he was withdrawn from the reach of the penalty which the Constitution inflicted in case of conviction. No doubt many of the senators believed that by that resignation he ceased to be an officer of the United States, and therefore ceased to be amenable to the jurisdiction of the court trying the impeachment.

(c) In reviewing, therefore, the history of the country, we may perhaps conclude, with Judge Story and others, that if the Senate be not the best tribunal for the trial of impeach-

¹ Nos. LXV, LXVI.

⁴ 1 Tucker's Blackstone, Appen.,

² 1 Tucker's Blackstone, Appen., 237.

200, 335-37, 346; Story on the Constitution, secs. 741-53.

⁵ Story on the Constitution, secs. 759-766.

³ No. LXV.

ment, history has not furnished proof that any other tribunal would have been better, or even as good.

(*d*) The next subject for consideration is the residue of this clause. "When sitting for that purpose, they shall be on oath or affirmation." This adds to the assurance of impartiality in the trial resulting from the character of those who are to sit upon it, the sanction of an oath, in addition to their general oath, to do justice in the particular case submitted to their decision. It might well have been supposed that this would be as solemn an appeal to the conscience of the triers as it is felt to be by every jury sworn to try a particular case.

(*e*) And further: "When the President of the United States is tried, the Chief Justice shall preside." Upon this sentence it may be remarked that it is the only place in the Constitution where there is any reference to the office of Chief Justice. The reason why the Chief Justice should preside on such trial is, negatively, that it excludes the Vice-President from doing so, who would be interested in the conviction of the accused, in order that he might succeed to the office, and perhaps it was supposed that it would add dignity and influence to the tribunal that it was presided over by the chief judicial magistrate of the United States.

(*f*) And further: "and no person shall be convicted without the concurrence of two-thirds of the members present." This places a great restriction upon the power of conviction. To give the power to a mere majority might make the fate of the accused depend upon the temporary partisan majority of the two Houses of Congress; the majority in the one House accusing, and the majority in the other House convicting. A majority of the one House to accuse, and two-thirds of the other House to convict, would make it, under ordinary conditions, impossible to convict a party accused, unless there was clear ground that appealed to public justice rather than to partisan passion. But "two-thirds of the members present," not two-thirds of all the members of the Senate, but two-thirds of those who shall be present at the time of trial, must concur in order to secure conviction.

(g) Upon the trial of President Johnson, a state of things occurred which illustrates this point very strongly. The majority against the President upon the articles of impeachment in both Houses was overwhelming, and, if a majority could have convicted in the Senate, he would have been condemned. But the requirement of two-thirds operated to acquit him, only one vote of the two-thirds being lacking. This protected him from conviction by reason of strong partisan feeling against him, because a two-thirds vote could not be obtained for that purpose.

(h) It does not appear that the Chief Justice or the Vice-President, when the Senate is sitting on a trial of impeachment, has any other function than to preside. The Vice-President or the Chief Justice might vote upon an incidental question if the Senate was equally divided, but upon the final judgment of acquittal or conviction there could be no equal division, and therefore no place for any such vote by the presiding officer.

§ 199. Article I, section 3, clause 7. "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States."

(a) By section 4 of article II of the Constitution it is provided: "The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." These two provisions indicate that the jurisdiction for impeachment only extends to an officer of the United States. In *Belknap's* case this was held to exclude the jurisdiction against the accused where he had resigned from office, although it was held by many that, as he was an officer at the time of the offense committed, he was still subject to impeachment, because the judgment in case of impeachment might not only be for removal from office, but disqualification to hold and enjoy any office under the United States. The decision was against the jurisdiction.

(b) We must note further, that impeachment can be made only of the "President, Vice-President and *civil* officers of the United States."

(c) It is further implied that the constitutional officers, the President and Vice-President, and all civil officers, may be impeached for treason, bribery, or other high crimes and misdemeanors.

(d) The first part of the clause authorizes judgment to remove the accused from office, and a judgment of disqualification to hold and enjoy any office of honor, trust or profit under the United States, but no further. The latter part of the clause provides that the party, though convicted and judgment rendered, as just stated, shall be liable and subject to indictment, trial, judgment, and punishment according to law, that is, in the ordinary tribunals of justice. This subjects the accused to the punishment for treason, bribery, etc., by the ordinary courts of justice, despite his conviction and judgment by the Senate under this clause. The officer shall not escape the punishment of the ordinary citizen for the crime of which he is accused by reason of the mere sentence of removal from office and the other disqualifications, under judgment of the Senate in the impeachment trial.

(e) But suppose the accused be acquitted by the Senate, will he be exempt from trial by the ordinary courts of justice? Despite the suggestion of Judge Story,¹ as the Senate has no right to punish the officer impeached, except by removal from office and other disabilities, and as he has never been tried for the offense committed by him as a man, but only for breach of official duty, it would seem that he could not plead *autrefois acquit*, if acquitted by the Senate, to an indictment in the ordinary courts of justice. He has been acquitted as an officer, but not as a man, and therefore may be tried as a man by the common courts of justice, though not again tried as an officer.

(f) The process of impeachment is a political proceeding

¹Story on the Constitution, sec. 780.

against the accused as an officer of the government, to protect the government from the present or future incumbency of a man whose conduct has proved him unworthy to fill it. But as a man, he is responsible for treason, bribery, and other crimes, though he may have been acquitted as an officer.

(g) In England the judgment in case of impeachment extended not merely to a punishment of the officer, but to the punishment of the man. Our Constitution forbids the Senate to inflict any punishment except upon the officer, and it can inflict none upon the man; but that cannot exempt the man from the punishment which the Senate cannot inflict, but which the ordinary courts of justice can alone impose.¹ If the Senate could by judgment of impeachment punish the man as well as the officer, it would probably be held that an acquittal by the Senate might be pleaded by the accused as a complete defense to a proceeding in the ordinary courts of justice; and as the Constitution provides: "But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law,"² that is, if convicted by the Senate he may still be tried by the common courts of justice for his crime as a man, it would seem to be an unreasonable construction of the Constitution to suppose that his acquittal by the Senate would work exemption of the prosecution in the common courts of justice, when his conviction would not do so.

(h) Who are subject to impeachment? Clearly, the President and Vice-President, who are constitutional officers of the United States, elected mediately by the people of the States through the electoral colleges; and civil officers in contradistinction to military officers, who are subject to trial and punishment according to the military code. Therefore, all civil officers of the United States are liable to impeachment.

(i) The language of the clause indicates that, in a consti-

¹ Story on the Constitution, secs. 781, 782; Rawle on the Constitution, ch. 22.

² Const. U. S., Art. I, sec. 3, clause 7.

tutional sense, the President and Vice-President are not civil officers of the United States, for otherwise the language would have been "and *other* civil officers."

(j) This question arose in Blount's case, in which the Senate decided that a senator was not impeachable as a civil officer of the United States. This decision was made on the 10th of January, 1799, by a vote of fourteen to eleven.¹ The correctness of this decision is obvious from a few considerations.

(k) The subjects of impeachment are the President, Vice-President and all civil officers of the United States.² By expressly naming the President and Vice-President, it appears that they are not within the meaning of the term "civil officers," and this is emphasized by the omission of the word "other" before the words "civil officers," which would naturally have been used if the Constitution regarded the President and Vice-President as embraced in these terms. The President and Vice-President are constitutional officers. Who, then, were included in the terms "civil officers?" The meaning of these words is interpreted by the last clause of section 3 of article II, which just precedes the use of the term "civil officers" as subject to impeachment. It explicitly declares that the President "shall commission all the officers of the United States," and these are the officers who, under article II, section 2, clause 2, are to be appointed by the President, by and with the advice and consent of the Senate, under the words "ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States," etc. These great and important offices, including judges, are embraced within the terms "officers of the United States," and the more clearly so by the use of the word "other" before the words "officers of the United States"—a word omitted before the words "civil officers" in the section with respect to impeachments.

¹ Senate Journal of that date; 58; Rawle on the Constitution, ch. Story on the Constitution, sec. 791; 22; Federalist, No. LXVI.

² Const. U. S., Art. II, sec. 4.

(l) The collation of these several clauses and others in the Constitution clearly indicates that the Constitution, in the use of the term "civil officers," intended to embrace merely those who were commissioned as such under the appointing power named in section 2 of article II of the Constitution. Nowhere in the Constitution is a senator or representative spoken of as an officer of the United States, or even as an officer at all, and in article I, section 6, clause 2, of the Constitution, the distinction between a senator or representative and a civil officer of the United States is very clearly made.¹

(m) Besides, the mentioning of President and Vice-President with all civil officers of the United States, and the omission of senators and representatives, leads to the conclusion that the senators and representatives were excluded from those who were amenable to impeachment. Senators and representatives are not commissioned by the President, and yet the President is required to commission all the officers of the United States; nor are they appointed by the President with the consent of the Senate, though the President is required to appoint all judges "and all other officers of the United States." It is obvious, therefore, that the impeachment power was intended to enforce the responsibility of those who held commissions under the United States government, and not of those who held their offices or their positions by virtue of the elective power of the people of the States. The naming of President and Vice-President, and the non-naming of senators and representatives, shows that only civil officers appointed and commissioned by the President were amenable to impeachment, except those expressly named, President and Vice-President, and senators and representatives coming under neither of these, and not expressly included, were excluded from the impeaching power.

(n) The judgment of impeachment was to remove from office and to disqualify from holding office under the United States the officer convicted, and to disqualify him from holding any office under the United States. These terms prop-

¹ See also Art. II, sec. 1, clause 2.

erly limit the jurisdiction of the tribunal to try impeachments to those who hold offices under the United States. A senator or representative does not hold office under the United States. The one is elected by the State legislature, the other by the people of the State. His authority is in no wise derived from the United States. He is responsible to the power that gave him authority, and not to the government of which he is a part and which could give him no authority. If to this it is answered that neither is the President or Vice-President appointed by the United States government, and therefore should not be impeachable, the reply is conclusive: they would not be so unless they had been expressly mentioned, and the senator and representative not being expressly mentioned is not within the reason of the impeachment power, nor within its terms.

(o) Besides, the United States may, by impeachment, debar a convict from holding office under the United States; but how anomalous it would be for an impeachment to debar a State from electing a convict to the position of senator or representative. The impeachment power was intended to cleanse the government from the presence of worthless and faithless officials, but not to debar a State from electing whom it pleases to represent it in the great council of the Union.

(p) But again, if it is asked, suppose, then, a senator or representative elected by a State is guilty of treason, bribery or other high crime, can the State force upon Congress the continued presence of men so faithless to their duty? The answer is that by article I, section 5, clause 2, each House of Congress may, with the concurrence of two-thirds, expel such unworthy member. His impeachability, therefore, is by the House of which he is a member. This power in each House is not only sufficient in the case of such a member, but is totally inconsistent with his amenability to this constitutional process of impeachment. If he be a senator and be impeachable, the House of Representatives must impeach him by a majority of its members, and the Senate, by a two-thirds vote,

convict him, which it might do under the expelling power without the accusation by the House. But if he be a representative, the House, by a bare majority, may impeach him, when two-thirds of that House are essential to expel him, and then the other body, by a two-thirds vote, is to expel a representative from the House upon an accusation by a bare majority of that House. This is sufficient to show that the power of expulsion by the House of which the senator or representative may be a member, so inconsistent with the procedure in case of impeachment, was intended to be a substitute for the ordinary procedure for impeachment of civil officers, and to exclude the latter by giving ample power to each House to expel upon a two-thirds vote. In fact, the House of Representatives, defeated in its attempt to expel a member by a lack of a two-thirds vote, but with a majority to accuse, may, by obtaining the judgment of the other House, accomplish the expulsion, which under the ordinary proceeding it would be unable to do. This seems to be too absurd to have been within the purview of the framers of the Constitution.¹

§ 200. What are impeachable offenses?

(a) Treason. This is defined by the Constitution.²

(b) Bribery, which needs no special comment. For its definition resort may be had to its meaning in *Criminal Procedure*.

(c) High crimes and misdemeanors. What is the meaning of these terms? Much controversy has arisen out of this question. Do these words refer only to offenses for which the party may be indicted under the authority of the United States? Do they mean offenses by the common law? Do they include offenses against the laws of the States, or do they mean offenses for which there is no indictment in the ordinary courts of justice? Or do they include mal-administration, unconstitutional action of an officer wilful or mistaken, or illegal action wilful or mistaken?

¹Story on the Constitution, secs. ²Const. U. S., Art. III, sec. 3, 791-793; 3 Elliott's Debates, 43-46, clause 1.
56, 57.

(d) Up to September 8, 1787, the clause in reference to the impeachable offenses only included treason and bribery. On that day Mr. Mason moved to add the words "or mal-administration." Mr. Madison objected to the vagueness of this term, whereupon Mr. Mason withdrew the word "mal-administration," and substituted "other high crimes and misdemeanors against the United States," and the clause was then agreed to by a vote of ten States to one.¹ As the word "other" is inserted before the words "high crimes and misdemeanors," these last words may be interpreted by the nature of the crimes "treason and bribery." Why should an officer be impeached for treason? Obviously, because an officer guilty of treason against the United States would be disqualified personally from being an officer of a government to which he was a traitor. How could a President properly command an army of the United States, when he was engaged in levying war against them, or adhering to their enemies? The utter inconsistency of this double position made it a proper offense for the jurisdiction of impeachment. The same objection would apply to any other officer of the United States. To be employed in the service of the United States, against which he was levying war, or adhering to their enemies, was a total personal disqualification.

(e) So in respect to bribery. Bribery corrupts public duty. The difference between treason and bribery is that the first is a crime defined by the Constitution, as to which Congress has no power except to declare its punishment.² Bribery is not a constitutional crime, and was not made a crime against the United States by statute until April, 1790. These two cases, therefore, show that the words "high crimes and misdemeanors" cannot be confined to crimes created and defined by a statute of the United States; for if Congress had ever failed to have fixed a punishment for the constitutional crime of treason, or had failed to pass an act in reference to the crime of bribery, as it did fail for more than a year

¹ Madison Papers, pp. 1528-30.

² Const. U. S., Art. III, sec. 3.

after the Constitution went into operation, it would result that no officer would be impeachable for either crime, because Congress had failed to pass the needful statutes defining crime in the case of bribery, and prescribing the punishment in the case of treason as well as bribery. It can hardly be supposed that the Constitution intended to make impeachment for these two flagrant crimes depend upon the action of Congress. The conclusion from this would seem to be inevitable, that treason and bribery, and other high crimes and misdemeanors, in respect to which Congress had failed to legislate, would still be within the jurisdiction of the process of impeachment.

(*f*) The word "mal-administration," which Mr. Mason originally proposed, and which he displaced because of its vagueness for the words "other high crimes and misdemeanors," was intended to embrace all official delinquency or mal-administration by an officer of the government where it was criminal; that is, where the act done was done with wilful purpose to violate public duty. There can be no crime in an act where it is done through inadvertence or mistake, or from misjudgment. Where it is a wilful and purposed violation of duty it is criminal.

(*g*) This construction is aided by the fact that judges hold their offices during "good behavior."¹ These words do not mean that a judge shall decide rightly, but that he shall decide conscientiously. He is not amenable to impeachment for a wrong decision, else when an inferior judge is reversed he would be impeachable; or, in the Supreme Court, a dissenting judge might be held impeachable because a large majority of the court affirmed the law to be otherwise. But if he decides unconscientiously,—if he decides contrary to his honest conviction from corrupt partiality,—this cannot be good behavior, and he is impeachable. Again, if the judge is drunken on the bench, this is ill-behavior, for which he is impeachable. And all of these are generically crim-

¹ Const. U. S., Art. III, sec. 1.

inal, or misdemeanor—for misdemeanor is a synonym for misbehavior. So, if he omits a judicial duty, as well as when he commits a violation of duty, he is guilty of crime or misdemeanor; for, says Blackstone,¹ “crime or misdemeanor is an act committed or omitted in violation of a public law either forbidding or commanding it.”

To confine the impeachable offenses to those which are made crimes or misdemeanors by statute or other specific law would too much constrict the jurisdiction to meet the obvious purpose of the Constitution, which was, by impeachment, to deprive of office those who by any act of omission or commission showed clear and flagrant disqualification to hold it. On the other hand, to hold that all departures from, or failures in, duty, which were not wilful, but due to mistake, inadvertence or misjudgment, and to let in all offenses at common law, which, by the decisions of the Supreme Court, are not within Federal authority at all, would be to extend the jurisdiction by impeachment far beyond what was obviously the purpose and design of its creation. It must be criminal misbehavior—a purposed defiance of official duty—to disqualify the man from holding office, or disable him from ever after holding office, which constitute the penalty upon conviction under the impeachment process. The punishment, upon conviction, indicates the character of the crime or misdemeanor for which impeachment is constitutional. If the crime or misdemeanor for which the impeachment is made be not such as to justify the punishment inflicted, we may well conclude it was within the purpose of the Constitution in using the impeachment procedure.

The same reasoning will apply to other offices of the United States as has thus been applied to the judicial office. The power of removal in other offices than the judicial is with the executive, and, if exercised by removal, the evil of his incumbency is at an end. But if the executive should refuse to remove an officer who commits a violation of duty, or

¹ Blackstone's Commentaries, Bk. IV, ch. 1.

wholly omits to discharge it; if the appointing power screens from removal one flagrantly delinquent in duty, the impeachment power is the reserved instrumentality by which the Constitution will remove the official delinquent in spite of the action of the executive in retaining him in the office which he disgraces. His flagrant misbehavior may work, through impeachment, his exclusion from office, whom a wicked executive would perpetuate in the official station he is disqualified to fill.

The history of English impeachment may be used to illustrate, and to aid in the interpretation of the jurisdiction of impeachment established by the Constitution; but we must avoid making the English precedent the measure of the impeachment jurisdiction of the Constitution. The English doctrine was contracted, or expanded, according to the temper of the times in which the cases arose. Bills of attainder often, in times of great excitement, took the place and satisfied the demands of public vengeance. How far impeachment reached beyond ministers of the crown and those who held offices under the crown,—whether it embraced peer and commoner,—whether it could arraign and punish a private subject who was not in office or public employment,—whether it extended beyond the subjects of criminal jurisdiction in the ordinary courts of justice, it is difficult for the ablest investigators into ancient precedents precisely to determine. Unquestionably, as Mr. Hallam asserts, the ministers of the crown were impeachable by the commons as a means of enforcing responsibility for royal misdeeds to the people, whose rights were violated by them; and this as early as the reign of Henry VII.¹

In the reign of James I., Mr. Hallam asserts, proceedings in the nature of impeachment were taken against Giles Mompesson, who was the patentee of a royal monopoly from which the king derived great pecuniary benefit, and his accomplice, Michell, for the abuse of the powers vested in

¹ Hallam's Constitutional History, p. 14 *et seq.*

them; against a judge for corruption in his office; against a bishop for being concerned in the matter of bribery. The impeachment of Lord Bacon for corruption and bribery in office is also mentioned. All of these were for offenses arising in the discharge of their official duties. How far impeachment proceedings were recognized against private persons who were not in office does not clearly appear. Be this as it may, our Constitution, by naming no persons as subject to impeachment but public officers, and no punishment for the offenses but removal from office and disqualification from holding office, taken in connection with the fifth and sixth amendments of the Constitution, prohibits punishment of the man for a capital or otherwise infamous offense, except by presentment of indictment to a grand jury and by trial by jury, seems to exclude all persons save those who hold the offices of President, Vice-President, or other civil offices in the United States, from impeachment.

In England, where bills of attainder were allowed against private persons, impeachment might be allowed against them also; but under our Constitution the limitation would exclude all private parties, because the jurisdiction appears to be aimed at those who hold public offices, and the punishment inflicted only worked the present and permanent incapacity to hold office. Our proceeding is aimed at the officer and not the man. Trial and conviction of the man can only be by the ordinary criminal procedure in the ordinary courts. And this seems to have been the result of the impeachment cases which have arisen in our country.

Blount, in 1797, was impeached for corrupt practices, but was acquitted on the ground that he was not a civil officer. Belknap, in 1867, was discharged because he had resigned his office, and was thus no longer subject to impeachment. John Pickering, in 1803-4, was found guilty for deciding a case before him contrary to an act of Congress; for refusing to hear testimony produced by the United States with intent to defeat their just claims; for refusing to allow an appeal by the United States contrary to an act of Congress,

and wickedly meaning and intending to injure' their revenues; and for acts of personal immorality committed in so public a manner as to degrade his office.

In Chase's case, 1804-5, a number of charges of official misconduct in deciding points against a prisoner contrary to law were made. The accused was acquitted, because the proof failed to establish any evil or arbitrary or oppressive design. In Judge Peck's case, 1830, the judge punished, for contempt, counsel for a party in the case who published an answer to the judge's published opinion in the case. The accused justified his act and negatived all evil intent. In Humphrey's case, the judge was impeached for treason and was convicted. In President Johnson's case, he was charged with a number of acts in violation of official duty, but was acquitted, though upon a close vote, because the acts charged were not proven to have been done contrary to his conviction of his duty, or in wilful violation of the Constitution or the laws of the United States."¹

The Constitution of the United States² gives to the President the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. The cause of this exception will be readily perceived by recurring to the abuse of the pardon power in England, where the crown was disposed to screen a wicked favorite from the punishment resulting from a conviction of impeachment. If the officers of the crown were made responsible to the people through the impeaching power of the House of Commons, that responsibility would be of no avail if the crown could shield its favorite from his well-merited punishment. Accordingly in the act of settlement, twelfth and thirteenth of William III., it was expressly provided "that no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament."³

¹ See Pomeroy's Const. Law, secs. 715, 727; Miller on Const. of U. S., 167, 171, 201, 202, 213, 217; Wharton's Com. Amer. Law, § 399.

² Art. II, sec. 2, clause 1.

³ Stubbs' Select Charters, Appen., p. 531.

The framers of the Constitution of the United States no doubt took this provision of our Constitution from this clause in the act of settlement, which was the result in England of a long struggle between the Crown and the Commons. So that the pardon of the President, while it may avail the guilty party when convicted in an ordinary court of criminal jurisdiction, will not avail to shield the criminal from the judgment of amotion from office and of disqualification to hold office thereafter, which the judgment in impeachment may inflict upon it.

§ 201. We may conclude what needs to be said on this subject of impeachment with a statement of the practice of the two Houses on this subject.

The procedure may be briefly summarized. When an officer is suspected of being guilty of an impeachable offense, a member, or a committee of the House (as in the case of Belknap), reports the facts to the House with a resolution either to draw up articles of impeachment or to appoint a committee for doing so. The committee so appointed reports a statement of the charges to the House, and the House then appoints a committee to impeach the party at the bar of the Senate, and to ask that the Senate shall take order for the appearance of the party to answer the said impeachment.

The articles of impeachment are drawn under the direction of the House of Representatives, which, when approved by the House, are presented by a committee of the House to the Senate, and a committee of managers are appointed to conduct the impeachment. As soon as the articles are presented the Senate issues process against the party to appear at a given date to answer the articles. The process is served by the sergeant-at-arms of the Senate, and due return is made under oath. These articles need not be in the strict form of indictment, but must contain sufficient certainty of allegation for the defendant to avail himself of any defense he may desire to make. At the return day of the process the Senate resolves itself into a court of impeachment, and,

being solemnly sworn as the Constitution requires, the person accused is called to appear and answer the articles. If he appears in person or by attorney, his appearance is recorded and his counsel are admitted to appear and to be heard upon the impeachment. If he fails to appear either in person or by attorney, his default is recorded, and the Senate proceeds to the trial *ex parte*. When he appears he is entitled to demand a copy of the articles of impeachment, and is allowed time to prepare his answer.

He may plead, as in ordinary courts, to the jurisdiction: as in Blount's and Belknap's case, they not being officers of the United States. He may deny the whole charge, or may plead in confession and avoidance, and in excuse of the acts involved in the impeachment. When his answer is prepared and filed, the House of Representatives, by the managers, may make replication thereto. When these preliminaries are all settled, a day is appointed for the trial; the House of Representatives appears at the bar of the Senate, either in a body or by their managers; the accused, either in person or by his counsel, may appear, and the proceedings are then conducted under the orders of the Senate, but substantially as in ordinary judicial trials.

After the parties impeaching and the party accused are fully heard, the Senate may debate the questions involved, which is done in secret session. A day is assigned for final public decision by yeas and nays upon the several articles of impeachment. The president of the Senate, as each member named is called, addresses the senator and asks the question: "How say you; is the respondent guilty or not guilty of the high crime and misdemeanor as charged in the — article of impeachment?"

If upon any article two-thirds of the Senate decide that he is guilty, he is convicted upon that article. If two-thirds do not vote that he is guilty upon any one article he is acquitted. But if guilty upon any one, or all, the Senate then proceeds to fix the punishment of amotion from office and disqualification to hold office under the United States gov-

ernment, or either of these, or with such qualifications and conditions as the Senate may determine. The judgment thus pronounced is recorded and is absolute and irreversible.¹

¹Story's Commentaries, secs. 803- 2570. See also the proceedings of 809; Jefferson's Manual, sec. 53; the Senate in the cases of impeachment. Cushing's Law and Practice, 2535-

CHAPTER X.¹

THE LEGISLATIVE DEPARTMENT—CONTINUED.

§ 202. The second clause of the fourth section is as follows: "The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day." This idea of an annual Congress was by analogy to the favorite practice in England of annual parliaments. This clause provides for an annual meeting on the first Monday in December, unless Congress should appoint a different day, so that the time of meeting every year was constitutionally fixed, and Congress could not change the annual meeting.² Under the British Constitution the king had the sole right to convene, prorogue and dissolve Parliament; but now Parliament assembles annually, though the king has the power to prorogue and dissolve.

Article I, section 5. The provisions of this article are in substance such as were practiced in Great Britain before the Revolution, and are usual in all legislative bodies under free governments. The first clause of this section will be considered in the order of its various provisions. The first gives to each House the right to be the judge of "the elections, returns and qualifications of its own members." In 1586 the House of Commons first asserted this right, and from the restoration of Charles the Second to 1770 the House of Commons decided upon the qualifications, elections and returns of its own members. Prior to that time the decision of these questions had rested with the king;³ but after the statute of 1406 and 1410 the returns of members of the House of Commons were in Chancery and not to the Parliament, and judges of assize

¹ See p. 401, note.

² Federalist, No. LII.

³ Stubbs, Constitutional History of England, Vol. 3, 437.

were directed by the Chancery to inquire into questions of undue returns and elections. The propriety of each House being the judge of these matters is very obvious. No power external to the House could decide them without an intrusion upon the question of its organization, which would be fatal to its freedom and independence. The right of the House, as a body, to determine upon the right of each member to a place in that body is so obvious that it needs no comment. The power of election is vested, as we have seen, in the constituency under the laws of the States; but whether that constituency have elected qualified persons, and whether the officers holding the election have made proper returns, is left to the House in order to prevent an intrusion of persons disqualified or not duly elected upon their deliberations.

The next sentence in this clause declares: "A majority of each shall constitute a quorum to do business." Under the English Constitution, in the House of Commons, consisting of about six hundred members, forty members constitute a quorum to do business; in the House of Lords, which body consists of several hundred members, three.

The origin of the word "quorum" was in the king's commission for justices of the peace, to whom powers were granted jointly and severally, with the addition of the word *quorum*; a certain number of those named might exercise the powers. The word was then extended to all public bodies. The necessity of some such provision is very obvious, for as all the members of such large bodies would not ordinarily be present, the designation of the number was necessary in order to make action ordinarily possible. A majority of the body constitutes a quorum, but what is a majority of the body? The Constitution declares that the House shall be composed of members chosen by the people of the several States, and the Senate of two senators from each State, chosen by the legislature thereof. Does the majority, to constitute a quorum, mean a majority of all the representatives which the several States may be authorized to elect, or of all who have been actually elected? And as

to all of those who have been actually elected, there may be some who have died or resigned or been expelled. Shall these be counted? The House of Representatives have by a series of decisions (as well as the Senate) settled that the House is composed of members who have been chosen as representatives, and the Senate of senators, who may therefore be present if they choose: all of these are to be counted as constituting the body, and a majority of these constitute a quorum. When, therefore, during the secession period the seceding States elected no members, the members which they might have elected were not counted in the number of those who constituted the body; and so when a member dies or resigns or has been expelled and no one has been elected to the vacancy, such members are not counted in the number necessary to constitute the body; therefore a majority of those who have been elected and may under such election take their seats in the body, and these only, are counted among the members of those who constitute the body, and a majority of these alone will constitute a quorum. The clause goes on to say, after declaring that a majority of each shall constitute a quorum to do business: "But a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide." This gives power to a less number than the quorum to do some business, that is, to meet as a quorum for the purpose of adjourning from day to day, and for the purpose of taking such order for the attendance of absent members as the House may provide. This provision was necessary for the continuity of the body and for enforcing the attendance of absent members in order to constitute a business quorum, but not for any other purposes.¹

§ 203. The next clause is, "Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds,

¹ Federalist, Nos. XXII and LVIII; Story on the Constitution, secs. 832-834.

expel a member." This clause is essential to support the autonomy of each House, and rules for its proceedings, unless opposed to some express provision of the Constitution, may be established by each according to its pleasure. These powers are similar to those of the two Houses of the British parliament.

The disorderly behavior for which a member may be punished has been a matter of some conflict of opinion: must it be for such behavior in the House only, or for misbehavior outside of the House? Blount was expelled from the Senate for an offense inconsistent with public duty, but it was not for a statutory offense, nor was it in his official character, nor during the session of Congress, nor at the seat of government; the vote for expulsion was twenty-five to one.¹ In the case of Smith, the motion to expel was made against him for supposed conspiracy in the alleged treason of Burr; the vote was nineteen to ten, and he was not expelled, but it would seem that a large majority of the Senate thought that the accusation was proper ground for expulsion, though the act was not done in the Senate, nor by him as a senator.² Perhaps, from the language of the clause, a member may be punished for disorderly behavior on the floor, or for conduct in the House, or perhaps in the committee room, which produces disorder and disturbs the proceedings and business of the House. Such punishment, it is obvious, may be inflicted by the majority of the vote of the House. The motion to expel a member may be for disorderly behavior, or disobedience of the rules of the House, in such aggravated form as to show his unfitness longer to remain in the House; and the cases above cited, as well as the reason of the provision, would justify the expulsion of a member from the House where his treasonable and criminal misconduct would show his unfitness for the public trust and duty of a member of either House. But expulsion, which is an extreme punishment, denying to his constituency the

¹ Story on the Constitution, sec. ² Id.

right to be represented by him, can only be inflicted by the concurrence of two-thirds of the House and not by a bare majority. The requirement of a two-thirds vote for expulsion was inserted as an amendment to the original provision by a vote of ten States, one other being divided. This authority to expel had existed in the House of Commons and was exercised for misconduct on the part of the member during the session of the House, and was extended to all cases where the offense clearly unfitted a member for parliamentary duties.¹

§ 204. The next clause is: "Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the journal." The provisions of this clause were matters of debate in the convention.² The importance of keeping a journal is to give publicity to the action of the House and permanence to its records; if no journal were kept, the responsibility of members to their constituents would fail, because the statement of a representative in justification of his official conduct could not be contradicted by an official record. The language is very precise and distinct. The word *keep* is emphatic,—it indicates that the journal, once made, cannot be destroyed or changed, else it would not be kept; and hence a rule of the House requires a journal to be read on the succeeding day, with liberty to amend or correct the action of the clerk if not accurate, by the decision of the House upon the question recently after the journal is made. This question was discussed upon the passage of resolutions by the Senate, expunging an order by the previous action of the Senate, which was disapproved by a majority of the Senate at a subsequent

¹ Story's Commentaries, sec. 837; ² Journal of Convention, pp. 219,
1 Blackstone's Commentaries, secs. 243-45, 354, 373.
163, 167; Rex v. Wilkes, 2 Wilson's
Rep. 257.

period. In that case the resolution was not to expunge but to draw marks around the order objected to. The publication of the journal as provided for was much objected to in the convention, because of the qualifications and exceptions made to such publication. The words "from time to time" were regarded as too indefinite, and the exception, "such parts as may in their judgment require secrecy," was supposed to give to each House too great a power to suppress the evidence of its action to insure the responsibility of members for such action, which was intended by the requirement that each House keep a journal of its proceedings. The meaning of the exception was, that the two Houses might suppress the publication of such parts of their proceedings as in time of war or public danger would require secrecy from the public, because the secrecy of our action from public enemies was necessary to public safety. In the Senate this rule has gone further: the Senate goes into secret session upon the consideration of nominations to office made by the President, and of treaties with foreign countries. From time to time strong and vigorous protests have been made against the universality of this practice.

The latter part of the clause in reference to the call of yeas and nays is important in making each member of either House fix his responsibility for his vote by the entering of it on the public journal instead of concealing his individual action under the action of the mass of the House on the passage of particular measures. The importance of this will often make the representative shrink from putting upon the record a vote which he might be willing to give without it. This mode of voting by yeas and nays, if applied to every question that arises in either House, would so obstruct public business as to be vicious in practice. The power to take the vote by yeas and nays is therefore to be properly qualified so as to give to a helpless minority the right to compel a show of hands on any question by requiring such a vote by such a number of members who desire it as would prevent

the undue obstruction of public business and yet give the power to a reasonable number of members to require such vote. These considerations justify the requirement of one-fifth of those present in order to the entering of the vote by yeas and nays.¹

At this point we may recur to the question of a quorum. We have seen that a quorum to do business consists of a majority of each House, and we have seen that a majority of each House is a majority of those who are members thereof and might be present to take part in its proceedings. How is this fact to be ascertained? What would be a proper rule when a division occurs upon the vote upon any proposition and the count of members so voting on either side will not amount to a quorum, while there may be members present and not voting who will, with those who have voted in the affirmative or negative, make a quorum? The device resorted to in such cases has been to demand a vote by yeas and nays, in order, if possible, to obtain the vote of all the members present; and yet the members who are present may refuse to vote. And the question has arisen, does a quorum mean a quorum of members present and voting, or a quorum of all the members present whether voting or not? The rule adopted in the Fifty-first Congress was that the names of members not voting "shall be noted by the clerk and recorded in the journal and reported with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business." The constitutionality of this rule came under the consideration of the Supreme Court in 1891.²

The Supreme Court decided that this was a constitutional rule, and that the members present, whether voting or not voting, were proper to be counted as making a quorum, and that, though a quorum did not vote upon the measure, yet if the members present and not voting, with those so vot-

¹Story on the Constitution, secs. 837-840.

²United States v. Ballin, 144 U. S. 1.

ing, may be more than a majority of the House, it constituted a quorum; and a law was legally passed by the House, when less than a quorum voted upon its passage, if non-voting members present with those so voting made a quorum. The court held that the House, having power to determine the rules of its proceedings, had the power to adopt such a rule as this, and that a majority of those present in the House at the time of voting, though a majority did not vote, was a quorum constituted to do business, and that the bill was passed by such a House, though the majority of the House did not vote for its passage.¹ In a previous case to this the Supreme Court had decided² that where a bill is signed by the speaker of the House and by the president of the Senate in open session, it is an official attestation by the two Houses that such a bill has passed Congress; and when such bill is approved by the President and is deposited in the State Department according to law, its authentication as a bill that has passed Congress is complete and unimpeachable, and it is incompetent to show from the journals of either House that such act did not pass in the precise form in which it was so signed by the presiding officers of the two Houses and approved by the President. The court will not inquire into the validity of the action of the presiding officer of either House by seeking for evidence upon their journals to impeach this final act of authentication.

§ 205. The fourth clause of section 5 is in these words: "Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting." This clause may be considered with the provision in section 3, article II, of the Constitution, which reads thus: "He (the President) may, on extraor-

¹The rule quoted in the above decision is practically the same as one introduced by the author in the House of Representatives January 28, 1880, but subsequently withdrawn. See "The Speaker of the House of Representatives," Follett, p. 189 *et seq.*

²Field v. Clark, 143 U. S. 649.

dinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper."

The first of these clauses makes the duration of each session of Congress depend solely on their concurrent will, except where the two Houses disagree in respect to the time of adjournment, in which case the President may adjourn them to such time as he thinks proper. The independence of Congress, therefore, is fixed, as its adjournment depends only upon itself, where the two Houses have agreed on the question of continued session or adjournment. It is only when they differ as to adjournment that the President can intervene. Under the British Constitution the king may prorogue the parliament; this was a power which interfered greatly with the independence of parliament. It is abridged with us by the provision above stated, so that the President can only prorogue by the adjournment of both Houses when they disagree upon the question of adjournment. The adjournment of one House is not the adjournment of the other — they are independent in this matter; nor can either House adjourn separately for a longer period than three days. This limitation upon the power of each House is needful to prevent either House from practically, by its separate action, adjourning both, which can only be done by either House under this provision for a period limited to three days. This explains a practice very common in Congress where either House, not having business to transact from day to day, adjourns for three days, but can do so no longer. These provisions, excepting the special power of the President above referred to, make it impossible for the President to do what the king so often did in reference to the colonial legislatures, by the prorogation and dissolution of legislative bodies at his pleasure.¹

The question has been discussed in England and in this country, What power has either House to deal with and

¹See Declaration of Independence.

punish intruders upon its deliberations, by any rule of its proceedings, or as a power incident to its constitutional existence as a part of the legislature of the Union? A very instructive case upon this question is that of *Stockdale v. Hansard*.¹ This power to deal with intruders, by expelling them from the House, or by punishing them for contempt or disorder, would seem to rest not only on the implication of such power as is essential to preserve the capacity of the body for performing its public duties, which is in reality simply the power of self-protection, but may be deduced from a former clause, by which the House may determine the rules of its proceedings, followed by the power to punish its members for disorderly behavior, etc. Under this, may it not determine, as a part of its rules of procedure, that that procedure shall not be intruded upon or obstructed by a stranger unless under a penalty? Can a mob or a single person break into the halls of legislation, and the legislative body be impotent to exclude and punish the intruders? If a House, in a proper investigation, requires a witness to testify, shall his contempt of their proper demand succeed because of the impotence of the House to enforce it? It would seem, therefore, to be clear that the power to punish, as well as to expel, intruders, and to enforce authority against a witness by punishing his contempt in refusing to answer, is inferable from the existence of the House as a deliberative body and from the above-quoted words of the Constitution. Two decisions in the Supreme Court sustain this view² in part.

The first of these cases presents a strong view in support of those already stated; the last case is not wholly in accord, and doubts the decision of *Anderson v. Dunn*, but puts upon it the important restriction that where the House has no

¹36 E. C. L. R. 88. See also 1 Tucker's Blackstone, 2; Jefferson's Manual, sec. 3; Rawle on the Constitution, ch. 4, p. 48. See also *Kielly v. Carson*, 4 Moo. P. C. 63.

²*Anderson v. Dunn*, 6 Wheat. 204; *Kilbourn v. Thompson*, 103 U. S. 168; *In re Chapman*, 166 U. S. 661.

right to make the investigation in the course of which the question is asked, it has no right to punish the witness for not answering the question. The lack of power to make the investigation inheres in its right to put the question; and having no power to put that, it cannot punish the witness for refusing to answer. This case would seem to confine the power of the House to punish a witness for contempt only to cases where the House is performing a function which is expressly confided to it.

It may perhaps be beyond the power of the House to infer its power to punish for contempt as incident to a granted power, and to hold that, where such implied power is essential to the general powers of the House, Congress, under the coefficient power,¹ should pass such law as it shall deem necessary and proper to carry into execution the power vested in either House; or Congress might pass a law subjecting to prosecution and punishment any party not a member of the House who should disturb its proceedings, or should disobey its proper command. Some such legislation Congress has passed, making such offenses cognizable by the United States courts.²

The House of Representatives has repeatedly punished persons not members of the House for disorderly behavior and violation of the privileges of members of the House. A celebrated case of this kind was that of Patrick Wood, who, for an assault upon a member of Congress in the city of Richmond, more than a hundred miles from the capital of the Union, was punished by imprisonment for several months, and for a period running beyond the session of Congress, contrary to the decision in *Anderson v. Dunn*, *supra*, which held that the House could not imprison in any such case beyond its session.

The power to imprison was exerted by the House of Representatives in the case of Randall in 1795, for an attempt to corrupt a member; in another case in 1796, in which a

¹ Const. U. S., Art. I, sec. 8, clause 18. ² R. S. 1878, 102-104.

challenge was given to a member; in Houston's case in 1832, for an assault upon a member. In these last cases the punishment was by reprimand by the speaker; and in 1800, Duane, for a libel against the Senate, was punished by imprisonment. The power to imprison, to fine, or to inflict more severe penalties, might well be regarded as in conflict with the fifth and sixth amendments of the Constitution of the United States; still the power by immediate action to prevent a present disorder by a stranger may well be held to be a preventive and not a punitive action. To arrest and exclude an intruder is simply remedial; to punish for a past transgression is in the nature of criminal procedure; and it seems as clear that either House has power, without any act of Congress, to use any means necessary to prevent a present disorder, by excluding a single intruder or clearing the House of all parties who are engaged in a disturbance of the proceedings of the House. This is remedial, not punitive.

The decision in *Kilbourn v. Thompson* materially qualifies the doctrine of *Anderson v. Dunn* and must therefore be regarded as an authoritative judgment of the Supreme Court as to the extent of the power of the two Houses in cases of disorder or contempt of its authority by any party not a member of the House;¹ but it seems to be clear that the right of the House to be exempt from intrusion or disobedience of its lawful orders may be vindicated by an act of Congress under the coefficient power of the Constitution;² by which either House might, of its own motion, take such immediate or remedial action as it should deem proper, or invest the courts of the United States with power to punish the same by criminal procedure.

§ 206. Article I, section 6. Under the Articles of Confederation³ each State maintained its own delegates in Congress. In the British House of Commons, members in early times were paid by their respective constituents, but at pres-

¹ In re Chapman, 166 U. S. 661, had not been reported when the above was written.—EDITOR.

² Art. I, sec. 8, clause 18.

³ Art. V, clause 3.

ent they receive no compensation. Under the Federal Constitution the reasons in favor of allowing compensation are very strong. In a society like that of England, where caste prevails to a large extent, even in the ranks of society below the nobility, it may be tolerated, but it excludes from the public service all who are not able out of their own means to support themselves while engaged in the discharge of representative duties. The representative must be a man of sufficient wealth for self-support, and under democratic institutions this was very objectionable; for while suffrage may include all classes, the suffragan, if of the poorer class, could not vote for a representative of his own class, because he would be unable to serve. To ensure an unlimited range of selection, all must receive for their services a compensation, to be ascertained by law. In addition it was provided that the compensation should be paid out of the treasury of the United States, and this for the reason that any inequality of compensation, which might result from leaving the amount to the several States, might be productive of evil and result in difference in social position between the members, which must be adapted to the means to sustain them in it.¹ It was well that the rate of compensation should not be unalterably fixed by the Constitution, but should be left to Congress to determine according to the change in social conditions that might arise in the future. Accordingly, Congress has changed the rate of compensation very often during the history of the Union.

The next part of the clause is very important: "They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place."

This privilege from arrest has been immemorially a privilege of both Houses of the British Parliament.² It was even

¹ Story on the Constitution, secs. 849-853.

² Story on the Constitution, secs. 856-862; Jefferson's Manual, sec. 3.

larger than is provided by this clause of our Constitution. If the representative of the people was liable to arrest, he could be taken by judicial process from the duties which he owed his constituency. It is therefore a primary privilege, secured to the constituency and to the House of which he is a member and in which he has a potential voice; it is a privilege secondary to the representative. It is therefore a privilege necessary to the discharge of paramount public duty. In England a like privilege was secured to the servants of the member and to his property; but this is not included in this provision of the Constitution. This privilege is against the summons to testify or a summons against him as a party, or to serve on a jury, for disobedience to which he would be liable to an attachment of his person. The arrest of the member is therefore a trespass *ab initio*, for which he may maintain an action or proceed against the transgressor by way of indictment; he may also be discharged from arrest by *habeas corpus*.¹

The privilege from arrest applies during the attendance of the members at the sessions of their respective Houses, and in going to and returning from the same. This is more restricted as to time than is accorded to members of parliament; and these words as to going to, and returning from, must be interpreted as a reasonable time. Therefore a member need not set out immediately on his return, but has time to settle his private affairs and prepare for his journey; nor does it require that he should take the shortest and most direct route home, but allows a reasonable deviation from that route.

But despite this privilege the exception to it is important. Members are not exempt from arrest for treason, felony, or breach of the peace. Such crimes against the government, and against the private citizen, do not exempt him from arrest, because public justice would thereby be defeated. And

¹ Jefferson's Manual; Case of the 151; 1 Blackstone's Commentaries, Borough of Warwick, 2 Strange, 164-166.
990; Rex v. Wilks, 2 Wilson's Rep.

it was held in Parliament, in the case of Wilks, that he was liable to arrest for a seditious libel, though contrary to the opinion of the judges in *Rex v. Wilks*.¹

The phrase, "breach of the peace," has been held to extend to all indictable offenses, whether attended with force, or only a constructive breach of the peace, because they violate good order.² This exception to the privilege is the same with that which is made to the privileges of the members of Parliament.

§ 207. The next great privilege is derived from the language of the Bill of Rights in England,³ which reads thus: "That the freedom of speech, and debates, or proceedings in parliament, which ought not to be impeached or questioned in any court or place out of parliament."

The insertion of this provision in the Bill of Rights, which was the foundation of the Constitutional Monarchy of England, put an end to what had so often been made an abuse of the independence of Parliament by royal arrests of members for words spoken in debate, and the prosecution of such members for such words. It was natural that the framers of the Constitution should insert this precious privilege in respect to the Houses of Congress, for if a member was punishable or questioned by any other authority than the House of which he was a component part, debate would be conducted under restrictions, which would make freedom of utterance impossible. It is akin to the same privilege which is accorded to a judge, who is not to be questioned or prosecuted civilly or criminally for any act in the line of his duty which is honestly and conscientiously performed.⁴ But this privilege does not protect the member from responsibility for what he may say outside of the House, and as a private person, though a member thereof.⁵

¹ 2 Wilson's Rep. 151; 1 Blackstone's Commentaries, 166, 167.

⁴ Randall v. Brigham, 7 Wall. 523.

² 1 Blackstone's Commentaries, 166.

⁵ Jefferson's Manual, 3; 1 Blackstone's Commentaries, 164, 165; Rex v. Creevy, 1 Maule, 273; Coffin v. Coffin, 4 Mass. 1; Federalist, Nos. LV, LVI.

³ 1 William and Mary, Sess. 2, ch. 2, in 1689.

In *Rex v. Creedy, supra*, a member was held liable for libelous matter contained in a speech delivered in the House, which he published or distributed, and was held liable, not for what he spoke in the House as a member, but for what he published out of the House as a man; but this view would hardly be held applicable to the publication of a speech by a member of either House of Congress, because the publication of debates in England is not strictly lawful, unless by leave of the House; but Congress by law directs the publication of the debates in the House, and this would not be an act of the member for which he would be personally responsible, so that the privilege of irresponsibility would not be denied to the publication of such speech in pamphlet form, and the distribution of it by the member; for such publication is merely a copy of what has been published in the debates, and is regarded in this country as a proper mode of informing the constituency of a member of the part which he has taken in debate. His responsibility to them requires or justifies such publication, and he cannot be held responsible for making known to them in this form, and by a copy of published debates, what he has said as their representative in the body of which he is a member.¹

In the case of *Kilbourn v. Thompson, supra*, this question is discussed, and the doctrine is stated that while a sergeant-at-arms was responsible for the arrest and imprisonment of Kilbourn upon the grounds already mentioned, yet the speaker and other members of the House, for privity with the sergeant-at-arms in the arrest of Kilbourn, were protected under this clause of the Constitution, because what they did they did by a vote, report and other action as members of the House, and therefore were protected from being questioned for any such in any other place.

§ 208. The next clause is as follows: "No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the

¹Story on the Constitution, sec. 863, and Speeches of Doddridge and Burgess in the House in May, 1832.

United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.”¹

The first part of this clause was intended to take from the senator or representative any personal motive which might operate upon him to create a new office or to increase the emoluments of any office, new or old. In the report of the Committee of Detail, August 6, 1787, the draft of the Constitution so reported denied to members of each House eligibility or capacity to hold any office under the United States during the time for which they might respectively be elected, and a like ineligibility and incapacity to hold by members of the Senate for one year afterwards.² The obvious purpose of this provision was to exclude executive influence upon the members of either House of Congress through the power of appointment. Mr. King moved, September 3, 1787, to insert the word “created” before the word “during,” so as to make the disability of the member apply only to the office created during the time for which the members were respectively elected.³

It was then proposed to insert the words, “created before, or the emoluments whereof shall have been increased;” which amendment was adopted. In the report of the Committee on Style on the 12th of September, 1787, the words, “during the time for which he was elected,” were repeated so as to apply to the period of disability as well as to the period during which the office was created or its emoluments increased;⁴ and in that form it was finally adopted. It is obvious that for some reason not divulged in the debates, or by inadvertence, the incapacity to take an office created during the term of a senator or representative which

¹Journal of Convention, 214, 319, 323; Rawle on the Constitution, ch. 19, p. 184, etc.; 1 Tucker's Blackstone, Appen., 198, 214, 215, 375.

²Madison Papers, 1230.

³Id. 1482.

⁴Id. 1547.

had been created, or the emoluments of which had been increased, during his term, expired with the term of the senator or representative; so that a member of Congress may be concerned in the creation of a new office, or in increasing the emoluments of a new or old office, on the last day of his term, and as to which he is eligible the next day. This provision against venal influence in the vote of a member of Congress is therefore very inadequate and may be readily evaded; but the provision has been vindicated by Judge Story,¹ and has been excused in the *Federalist*.²

The second branch of this clause prevents any person holding any office under the United States from being a member of either House during his continuance in office. As all officers of the United States are appointed by the executive itself, or by it with the consent and advice of the Senate, this provision was clearly intended to exclude the official influence of those who were dependent upon the will of the executive from taking part in the deliberations of the legislature. This influence might be greatly extended, and might be very small; but small or great, it is a valuable provision against any influence by the executive department in legislation. It is in conformity with the celebrated maxim of Montesquieu, to which reference has previously been made.

This principle is very different from that which rules in the British Constitution. In England at this day and during this century, all the members of the cabinet constitute in reality the British executive for all efficient purposes, though the dignity of the executive is embodied in the crown. The prime minister must be a leader of his party in one of the houses of parliament, usually in the House of Commons; and while the crown selects the members of the cabinet they are members of one or other House of Parliament, and hold office by the sanction of the House of Commons. A ministry in whom that House has no confidence must resign as soon as the House declares its lack of confidence, expressly or in-

¹Story on the Constitution, sec. ²No. LV.

ferably, despite the wish of the monarch. By these means there comes to be an essentially democratic infusion into the cabinet of the crown; the crown appoints, and the House of Commons confirms. If the House of Commons disaffirms, the appointment is a nullity. These principles have been sufficiently explained *supra*.¹ An interesting chapter on the cabinet is to be found in Bagehot's English Constitution.²

These views demonstrate that, after the lapse of ages, the British crown in all of its efficient power is in a large degree, through its cabinet, responsible to the English House of Commons, and through it to the people. The presence of the cabinet on the floor of the two Houses, where its members are confronted by the constituency to which they are responsible, is therefore an essential element in the organism of the British government. Without it the crown would be independent of the legislature and could defeat legislation by its absolute veto; but the British Constitution as it is has made the veto of the monarch a thing not known for two centuries, because such veto would now be a signal for the dismissal of the cabinet, which holds virtually the efficient powers of the executive.

In the United States and under our Constitution, the President has a constituency (to which he is responsible) different from the constituencies to which senators and representatives are responsible. To make him or his cabinet hold power under responsibility to either or both Houses of Congress would be a total subversion of our constitutional organization. The admission of the members of the cabinet to the floor of either House, and as members thereof, would not only admit the presence of executive influence to control the legislation of the country, but would poison the independence of the senator as representative of a State or of a representative with a popular constituency by the seductive and dangerous influence of executive honor and emolument. The senator or representative would be an appointee

¹ *Ante*, §§ 97, 98.

² Page 67.

of the executive, while he was a representative of the States. Such a condition of things would destroy those checks and balances of which we have so fully spoken, and violate the rule of separation of the departments under the maxim of Montesquieu, which had so controlling an influence in framing the Federal government. The purpose of the British Constitution in admitting members of the cabinet to the floor of either House was to enforce their responsibility to the people. To do so in the United States could have no such purpose, for neither the cabinet nor the President is responsible to either House of Congress.

These reasons were fully in the minds of the framers of the Constitution; and while we readily see the importance attached to the presence of the cabinet in the two Houses of Parliament, no such principle can operate in our Federal system, because the reasons which induce the practice in the British government have no place in the structure of our own. The genius of the two systems is, *quoad hoc*, totally diverse. To attempt to ingraft the English practice upon our own polity would be to put a piece of old cloth on a new garment.

To admit the cabinet to a seat on the floor of either House, not as members, but to be required to answer all of the inquiries of members of either body, and to divulge the motives of executive action in the various departments, would not only bring to bear upon the action of the House the influence of the presence of executive officers who were neither members of it nor responsible to it, which would be vicious in its tendency, but on the other hand would expose the executive policy of the President to improper inquisition by either House through inquiry addressed to his subordinate agents in the cabinet. The independence of the executive, secured by the Constitution, would thus be impaired or overthrown, and the insidious presence of executive power and influence might operate disastrously though in subtle forms upon the independence of the representatives of the people.

The right of either House to make all inquiries of the President or of the executive departments as to matters pertaining to the public interest is fully secured by the public reports of those departments, the annual and special messages of the President, and by the fact that information from the departments is furnished upon request of either House, so far as is not inconsistent with the public good. The polity of the English system is quite strongly presented by Judge Story.¹ Under the British Constitution any influence of the Crown through the members of the House of Commons, who are appointed to places in his cabinet, is prevented by a provision that the acceptance of office under the Crown vacates the seat of the member of the House of Commons, and that he must stand for a new election, in which his constituency shall be allowed to say whether they can trust him as their representative when he holds office under the Crown.

§ 209. The seventh section of the first article and first clause thereof declares, "All bills for raising revenue, shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills." In the earliest parliamentary records, the lords and commons made their several grants of supply without mutual communication; this continued as late as the reign of Edward the Third; after this time the change occurred, when the commons were said to grant with the assent of the lords. The commons' proportion of the taxes being far greater than that of the lords, the grant was deemed to be theirs, subject only to the assent of the lords. Afterwards, in the reign of Henry the Eighth, lords and commons were said to grant; but in the first Parliament of Charles the First, the commons recited the grant

¹ Story on the Constitution, secs. 866, 869, *e contra*; Rawle on the Constitution, ch. 19; 1 Tucker's Blackstone, Appen., 198, 214, 215; Federalist, No. LV. A measure was proposed many years ago by a distinguished senator from Ohio, Mr. Pendleton, for admitting members of the cabinet to the floor of either House, for the purposes of obtaining information and the like. The proposal failed.

as wholly their own; but it has now come to be a settled rule of the government, that money bills originate with the commons; these the lords may refuse to pass, but cannot alter or amend. This seems to rest upon the principle, that as the commons bore a much larger portion of the burden than the lords, the power to measure the burden should originate with the commons; and if the burden bore too heavily on the lords, the lords might reject, but the initiative in the construction of a scheme of taxation was left to the representatives of the people, who bore the largest burden, with protection against undue burden on the lords by their right of dissent to the whole bill, or concurrence in all of its provisions. If the initiative had been left to either house, indifferently, there would naturally have been a collision as to which bill should be first considered, and in the conflict the revenue bills might fail; but the exclusive initiative power being vested in the commons, nothing is left to the lords but to assent to the whole, or by dissent to defeat the public need for revenue.¹

In the convention which framed the Federal system, we have seen that in the compromise as to the organism of the two Houses the equality of States in the Senate was sought to be set off by the peculiar power given to the body representing the popular constituency, to have the initiative in bills known in England as money bills; that is, for taxation and appropriation. It was argued: you may safely give equality of vote to all the States in the Senate, if you give the initiative of taxation and appropriation to the body representing numbers. Much discussion occurred as to the practical value of this initiative power, but the mass of the convention justly valued it as a great advantage to the large States, because it gave to the taxpayer, as such, the initiative as to the amount of tax, and gave to the States, as such, only the power to amend, alter or reject. This is one important

¹See on this subject, Hallam's *Constitutional History*, ch. 13, §§ 508-511.

function in which the House has special advantage over the Senate.

In England grants to the Crown by the commons with the assent of the lords depended upon the exercise of two functions: one to raise the money, the other to appropriate it to the public purposes for which the Crown should use it. The amount of burden and the distribution of it upon the people was one thing, and the purposes for which the money should be appropriated was an entirely distinct thing. The first defined the exaction by taxation which was proper to be imposed upon the people; the latter was a check upon the Crown as to the purposes for which public money was to be appropriated. The first protected the taxpayer from any exaction to which, by his representatives, he did not consent; the other was a defense of the people of the kingdom from royal projects which the people's representatives did not approve. Without the first the people might be unjustly burdened with taxes; without the second the Crown might waste the money granted by the people, from wars of ambition and treaties and other acts destructive to the well-being of the nation.

Under our system of government, where both Houses of Congress as well as the President are elected directly or indirectly by the people, this responsibility as to appropriations will always be directly or indirectly to the people; while, therefore, the initiative as to taxation should be with the house that represents the mass of taxpayers, the initiative as to the objects of appropriation may very safely be entrusted to either House consistently with the popular will.

§ 210. It would be interesting to trace in detail how the English rule, which gives to the House of Commons the initiation of all money bills, which includes as well bills for taxation as for appropriation, came to be in our Constitution so modified as to give the initiative to the House of Representatives in all bills for raising revenue, and not for appropriation. It will be sufficient to show that this was the

intention of the convention in the language used in this clause of the Constitution. At one time during the convention the proposition to give the House the initiative in all "money bills" and to exclude the Senate therefrom was defeated.¹ After much struggle, heretofore referred to, a committee was appointed July 2d for the purpose of proposing some compromise. It reported July 5th, and the convention adopted July 16th the proposition "That all bills for raising or appropriating money . . . shall originate in the first branch of the Legislature of the United States, and shall not be altered or amended in the second branch."² This proposition, interpreting the words "money bills" used in the first proposition, was referred to the Committee of Detail, and was reported back in the same terms by that committee.³ All these propositions, on the 13th of August, after a series of motions, were defeated.⁴ August 15th Mr. Strong proposed that each House might originate all bills, "except bills for raising money for the purposes of revenue, or for appropriating the same, which shall originate in the House of Representatives; but the Senate may propose or concur with amendments as in other cases."⁵ September the 15th Mr. Brearly reported from the committee of eleven, as a substitute, "all bills for raising revenue shall originate in the House of Representatives, and shall be subject to alterations and amendments by the Senate." The consideration of this was postponed.⁶ September the 8th this proposition was adopted with this alteration: "But the Senate may propose or concur with amendments, as in other bills."⁷ September the 12th this clause was reported by the Committee of Style, and retained as a part of the Constitution.⁸

It is thus seen that the convention understood the English phrase "money bills" to embrace bills for raising revenue and bills for appropriating revenue, and that the convention

¹ Madison Papers, 747, 855.

² Id. 1023, 1024, 1108.

³ Id. 1223, 1228.

⁴ Id. 1316.

⁵ Id. 1330, 1331.

⁶ Id. 1494-1496.

⁷ Id. 1530, 1531.

⁸ Id. 1548.

in its final action discriminated between these branches of the term "money bills," as understood in England, and purposely gave the initiative to the House as to bills for raising revenue, and left bills for appropriating revenue to the rule, as to all other bills; that is, that either House might originate appropriation bills as they did in all other cases.

§ 211. This explanation as to the meaning attached by the convention to the words, "All bills for raising revenue," is given thus fully, because in 1872 the question was discussed by the committees of the two Houses of Congress; the House insisting that the initiative on bills for appropriation of revenue was confided to the House of Representatives as well as bills for raising revenue. The facts above stated seem to settle the question against the claim of the House to originate bills for appropriation as well as for raising revenue. The reasons already given for the power of the House to originate both are inapplicable to our Constitution; for while the amount and distribution of taxation is proper to be vested in the representatives of the taxpayers, there is no reason why, when that has been done by the initiative action of the House, the purposes of appropriation shall not be as well defined by the initiative action of the Senate. Discrimination as to the objects of appropriation cannot increase the burden imposed on the taxpayers, and may as well be made by the one House as the other. In England the House of Commons took advantage of this initiative power to raise revenue, by attaching to such revenue bills legislative provisions in respect to matters foreign to the money bill, and the lords in 1702 passed a standing rule, "That any clause or clauses to a Bill of Aid or Supply, is unparliamentary, and tends to the destruction of the Constitution of this government."¹ The reason of this rule was that the addition of foreign matter to such bills tended to coerce the lords to assent to that, though it might be objectionable to them, in order to secure the passage of the bill for raising revenue.

¹ Amos' Fifty Years of the British Constitution, p. 73.

This objection made by the House of Lords was used with great force in the House of Representatives in 1880 upon the consideration of a bill for an appropriation for the support of the army, in which was inserted a proviso that the army should not be used to influence any elections by the people. Mr. Garfield contended that this proviso was foreign matter; the insertion of which would shake "the granite foundations of free consent in both Houses and with the President;" but the answer was made that such proviso was germane to the bill, because appropriations for the army could not be made for a longer period than two years,¹ and that this clause was made a part of the Constitution to enable the Congress, in appropriating money for the army, to make them upon such terms as would prevent the President as commander-in-chief from using the army for unconstitutional purposes.²

§ 212. It was suggested by an early and able commentator that the term to raise revenue included post-office bills, mint bills, and bills in reference to the sale of public lands.³ This seems to be a misconception; for such bills do not impose a burden on taxpayers; and this clause historically, and as applied in the English practice, only related to revenue raised by taxation, and was intended to protect taxpayers.

The words used as to the Senate are not as clear as is usual in the Constitution; but taken altogether, it obviously means that the Senate might propose amendments to the revenue bill and concur with any afterward made by the House. This power was properly vested in the Senate, because while the House represents the taxpayers at large, the Senate represents the States, who are interested in direct taxes, which were to be apportioned between the States; and as to general taxes, the large States, by their dominant power in the House, might levy them to the injury of the small States.

¹ See Const. U. S., Art. I, sec. 8, Reply, April 4, 1879, Congressional clause 12. Record, and Reply of General Gar-

² Federalist, No. LXVIII; Hallam's Constitutional History, ch. p. 675).

15; Garfield's Speech, vol. 2 of his Works, pp. 655, 679, 685; Author's ³¹ Tucker's Blackstone, Appen., 261.

The power to amend such bills in the Senate was judicious and necessary.

§ 213. The next clause of the seventh section relates to the veto power, the terms of which may be seen in the Appendix. This power of the executive of England was absolute, but has never been exercised since 1682. The royal veto was intended to protect the prerogative of the crown; but the President with us has no prerogative, but only delegated powers, with the provision that Congress shall pass all laws necessary and proper to carry into execution the powers vested in the President. To give to the President an absolute veto would be to vest in him an autocratic power, which would be dangerous; hence the convention decided, without difficulty, that the veto given to the President should be qualified, not absolute; so qualified as to allow a two-thirds majority of the two Houses to overcome it, and make it of no avail. The two propositions which were considered in the convention were whether it should be overcome by a two-thirds vote or a three-fourths vote of the two Houses. Two-thirds was finally adopted as the most judicious, because three-fourths would usually allow the veto to be absolute, and a majority would make it of no avail. On this subject, reference to the authorities and to the debates is all that is necessary.¹

The purposes of this veto power may be summarized: (a) To protect the executive power against invasion by Congress, and against the hostile or insufficient action of Congress, under the eighteenth clause of section 8, article I, above referred to. (b) To protect the Constitution against unconstitutional legislative action, and against injudicious and hasty legislation. (c) By article II, section 3, the President may recommend to the Congress "such measures as he shall judge necessary and expedient." This is not initiative legislation, but only a recommendation of such to the legislative body. But this veto introduces the President into

¹ Journal of Convention, 69. 96, 97, 195, 253, 254, 355; Federalist, Nos. LI, LXIX, LXXIII; 1 Kent's Commentaries, lecture 11; 1 Tucker's Blackstone, Appen., 225, 329; Story's Commentaries, secs. 878-890.

legislative action to the extent of preventing a bill from becoming a law; but he cannot amend or alter the law in any respect. He checks, but does not legislate. (*d*) His veto is accompanied with his reasons for disapproval. This has the effect of calling to the attention of Congress the validity of his objection, which possibly it had overlooked. This check is in so far valuable; but it is not absolute, for it may be overruled by the vote of two-thirds of each House, the vote being taken by yeas and nays. (*e*) The main advantage of this veto power is found in its being an important part of that system of checks and balances, established by the Constitution to prevent unconstitutional or wrongful legislation, which requires the concurrent majorities of the popular will in the three forms in which that popular will is manifested through the organism of each House of Congress and through that of the executive department.

The House of Representatives, as we have seen, represents public sentiment according to the number of persons in the State. This is substantially the numerical majority. The Senate represents the equipollency of the States, regardless of the respective numbers of their people. These two majorities, based on such diverse constituencies, are great checks for statehood upon numbers, and of numbers upon statehood. The President, however, is the representative of the States, estimated by neither numbers nor equality of statehood, but by the two combined; each State having a number of electors equal to its number of senators and representatives. These electors are appointed as the State legislature may prescribe, and are not necessarily, therefore, elected by popular vote, nor by the State legislatures; and in default of the election of a President by some one receiving a majority of all the electors, he must be elected by the House of Representatives, which represents numbers and popular constituencies, but voting for President upon the principle of equipollency of States. It is obvious, therefore, that a bill, before it becomes a law, must be approved by three constituencies, singularly diverse from each other.

The purpose of the Constitution was wisely directed not to make legislation easy, but to make it difficult, in requiring popular consent to be expressed through three diverse organisms, and so diverse as that a concurrence of all three would be a supreme assurance that the result could not be disastrous to the people or to the States. Its object was to obstruct the passage of a bill by forbidding any to become law until these diverse expressions of the popular will should concur in their sanction of its constitutionality and wisdom.

While the veto power appears to increase executive influence to too great an extent, yet its danger is avoided by two considerations: it has no positive force, but only negative; it prevents, but effects nothing; it is not aggressive, it is only obstructive. The Fathers believed that the danger of liberty was in the misuse, not the non-use, of power; overaction was more perilous to the individual citizen than non-action; and the President, by preventing bad laws, would do infinitely more good than in vetoing good laws. Another consideration is important. Executive activity is always proportioned to the amount of legislation; the more laws there are, the more need for executive power; the more enterprises Congress inaugurates, the more patronage and influence the President will have. The exercise of his negative is a restriction upon his positive power; and executive influence has in all our history increased in direct proportion to the enterprises initiated by Congress and the aggressive policy which Congress adopts. So far from the veto expanding executive influence, it tends to diminish it. The speech of Mr. Calhoun on the veto power, and the proposition to amend the Constitution by depriving the President of it, in 1841, presents the most philosophical and profound view of this subject that has ever been given, and is worthy of perusal and study.¹

It was proposed during the convention to unite the Supreme Court with the President in revising the legislation of Congress. This obviously had in view the duty of the exec-

¹ 4 Calhoun's Works.

utive, as of both Houses, to conform their legislation to the Constitution, which the members of both Houses and the President were alike sworn to support, while the Supreme Court is charged with the function of declaring a law unconstitutional only when repugnant to the Constitution. This function, as we have seen, is different from the higher one with which the legislature and executive are charged. These two must put no law on the statute book and let no bill pass until it answers the challenge of the Constitution and satisfies them that it is unauthorized by that instrument and not merely repugnant to it.¹ But other objections to this provision as to the Supreme Court were strong. As a court, its jurisdiction is to interpret and apply law, not to make it: *jus dicere non dare*. The proposal would unite in the court the function of two departments, and defeat its function of interpretation by giving it the function of making law. Besides all this, the convention might well fear lest the exercise of any political function would soil the ermine of the judge.

§ 214. A bill, order, resolution or vote (except as to adjournment), having passed by the majority of both Houses, is presented to the President for his consideration; and ten days, Sundays excepted, are allowed for his consideration. If he approves the bill, it becomes a law; if he does not disapprove within the ten days, it is law without his consent; if he disapproves within ten days, he must send the bill or other act to the House in which it originated, with a statement of his objections. This is his constitutional appeal for reconsideration of the act and a statement of reasons to induce Congress not to repass it. The vote is taken in the House in which it originated and to which it is returned by the President. If on a vote of yeas and nays the bill is repassed by two-thirds majority, it is sent to the other House for consideration, and if there passed by a two-thirds majority it is a law *non obstante* the objections of the President; if either

¹ Journal of Convention, 69, 96, 195, 253.

House fails to pass it by a two-thirds vote, it does not become a law. But the President must have ten days. If by adjournment or expiration of its term Congress closes its session before the ten days elapse, the bill, order, etc., not having been approved by the President, fails to become law.

The proceedings of the two bodies of Congress are prescribed by each for itself. These rules, in a large degree, are in accordance with the procedure in the two Houses of the English Parliament, but they may be changed and modified at will. In respect to these, reference may be had to some authors.¹

POWERS OF CONGRESS.

§ 215. The chief powers of Congress are enumerated in article I, section 8, of the Constitution. We have already seen that one of the vices of the Confederation was the absence of power in Congress under the articles to raise its own revenue for the execution of its important powers.

The eighth article of the Confederation ran in these words: "All charges of war, and all other expenses that shall be incurred for the common defense or general welfare and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct and appoint."

"The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled."

¹ Story on the Constitution, secs. 1-10; 1851, 898; 1 Tucker's Blackstone, Appen., 229, 230; Kent's Commen-
taries, lecture 11; Jefferson's Manual, ual.

The Constitution of the United States, in lieu of this provision, makes this provision in the first clause of article I, section 8:

“The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.”

This delegates power to Congress, and it has no other. “All legislative powers herein granted shall be vested in a Congress of the United States,” etc.¹ To execute this power the laws passed must be necessary and proper for the purpose.² The tenth amendment of the Constitution confirms all this.

Let us then carefully interpret this clause and get at its true meaning.

1st. It is a revenue power vested in Congress as a substitute for the eighth article of the Confederation, giving to the Federal government an express power to raise its own revenue independent of State action; as it had been dependent on State will under the Confederation. The language imports a revenue power to lay and collect. These words are wedded and are not to be divorced. Taxes are not to be laid except to be collected; revenue is the object of the grant and none other. Hence no other should be employed.

2d. What is the meaning of the terms “taxes, duties, imposts and excises?”

The authors of the *Federalist*³ attempt no specific definition of the meaning attached to each of these terms. Nor is there in “The Debates of the Convention,” reported by Mr. Madison, any precise definition of them. We are left, therefore, to seek the meaning of them as best we may by reference to other clauses of the Constitution, and the meaning attached to them by writers on political economy. “Taxes”

¹ Const. U. S., Art. I, sec. 1.

³ Nos. XXXII to XXXVI

² Id., Art. I, sec. 8, clause 17.

is a broad word, which, in its general signification, may mean all methods by which a government, under its power of eminent domain, can compel a contribution to its public revenue by the citizens of a country out of their private means. The word is used in various parts of the Constitution, sometimes with the adjective prefixed, and sometimes without it. The term "direct taxes" is used in two clauses of the Constitution — article I, section 2, clause 3, and in article I, section 9, clause 4. The use of this adjective prefixed to the word "taxes" does not appear elsewhere in the Constitution, and in both of these cases it is connected with the limitation the Constitution makes upon the power to levy direct taxes.

The word "taxes," as the alternative of the word "duty," appears in two places in the Constitution.¹ In the first of these it is said, in reference to the migration or importation of persons into any of the States, that they shall not be prohibited prior to 1808, but a "tax or duty may be imposed upon such importation not exceeding ten dollars for each person." This use of the two terms *tax* and *duty* may have been to cover any aspect in which an imported slave could be viewed, either as a person or property. In the second case, the language, "No tax or duty shall be laid on articles exported from any State," was probably intended to cover the case of a tax on an article which was *in transitu* to be exported, or the case of a duty upon the article when it became a subject of export. In other clauses of the Constitution the word "imposts" is in the alternative of the word "duties," as to the power of the State in reference to such being laid on imports or exports.²

From these uses of the term "taxes" in the clauses mentioned, and "direct taxes" in the two clauses mentioned, it would seem that the framers of the Constitution had in their minds certain forms of taxes which they called "direct

¹ Const. U. S., Art. I, sec. 9, clause 4; Id., clause 5. ² Id., Art. I, sec. 10, clause 2.

taxes," and other forms of taxes which were the alternate of "duties." So that taxes which were the constitutional synonym of duties were to be distinguished from the taxes which were "direct taxes." In other words, it would seem to be the true construction of the Constitution that taxes which were "direct taxes" were to be laid according to the apportionment plan, which in the second case where those terms are used is connected with their use, and all other taxes which were not embraced in the term "direct taxes," and were synonymous with "duties," etc., were properly embraced within the terms "duties, imposts, and excises."

This conclusion results from the fact that while the Constitution limits the power of Congress in reference to direct taxes by requiring them to be laid according to the census apportionment, and that duties, imposts and excises must be uniform throughout the United States, it could not have meant to allow any taxation which was not included within one or the other of these groups. For if it did, then it would follow that taxes which were not direct, on the one hand, or within the terms "duties, imposts and excises," would be laid at the discretion of Congress, without being subject to either of the limits prescribed for direct taxes or for duties, imposts and excises. It would seem, therefore, to be an inevitable construction of the Constitution that no tax could be laid upon the citizen by Congress which was not either subject to the census apportionment, or to the requirement of uniformity, else it would leave to Congress some unrestrained power to lay taxes which were neither direct, nor duties, imposts and excises. All taxation, therefore, which is not direct "taxation," must have been intended to be a general term embraced in the words "duties, imposts and excises."

§ 216. What is the meaning of the word "duties?" Radically it means what is due to, and might, therefore, be co-extensive with the word "taxes." But the Constitution seems to confine it to impositions on imports and exports. Thus a State is prohibited from laying imposts or duties on

imports or exports.¹ Congress is prohibited from laying a tax or duty on articles exported from any State.² And the word "duty" is also applied to tonnage.³ It may be therefore within the meaning of the framers of the Constitution that the word "duties" was applicable to imports, exports and tonnage.

The word "imposts" (*imponere* — to put upon) is a broad term, which might include all burdens imposed upon the citizen for the purpose of governmental revenue. In the Constitution it is made by the framers the alternative of "duties," "imposts or duties," and "duties and imposts."⁴

"Excises" (*excidere* — to cut off from) is the withholding by the government from the producer of a part of his product as a license tax on his business, such as the whiskey tax, etc. Several cases in the Supreme Court have attempted to give a definition of these terms, and may be referred to.⁵

From what has been said it is obvious that the mode of laying "direct taxes" and those which are indirect, included under the terms "duties, imposts and excises," are subject to different restrictions. "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a number of years, and excluding Indians not taxed, three-fifths of all other persons."⁶ And further: "No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken."⁷

The first of these provisions affirmatively directs the mode in which the direct tax shall be apportioned; the last prohibits its being laid in any other way. Since the abolition of slavery, the "three-fifths of all other persons" has been

¹ Id., Art. I, sec. 10, clause 2.

² Id., Art. I, sec. 9, clause 4.

³ Id., sec. 10, clause 3.

⁴ Id., Art. I, sec. 10, clause 2.

⁵ *Pacific Ins. Co. v. Soule*, 7 Wall.

433-440; *Veazie Bank v. Fenno*, 8

id. 533; *Scholey v. Rew*, 23 id. 331; *Springer v. United States*, 102 U. S. 585.

⁶ Const. U. S., Art. I, sec. 2, clause 3.

⁷ Id., Art. I, sec. 9, clause 4.

stricken out of the Constitution by the fourteenth amendment, which makes the basis of apportionment the whole number of free persons. The mode of apportionment has been for Congress to determine what revenue it proposes to raise from direct taxes, and then to apportion the amount to be derived from each State according to the proportion of the population of that State to the whole population. Congress then lays the taxes upon the proper subjects for direct taxation, in such wise as to derive the amount apportioned to that State.

What is the meaning of the requirement that all duties, imposts and excises shall be uniform? This word "uniform" has no reference to the burdens which, by the imposition of these duties, etc., must be laid upon the different States. Direct taxes are apportioned among the several States. Uniformity of taxation disregards State boundaries, and requires that the form of duty, impost or excise in any State shall be the same in all the States. These direct taxes, being apportioned among the several States, are a burden laid upon the citizen according to the population of the State, and the amount apportioned to any State is to be distributed among the citizens of the State so as to raise that amount; and the subject of direct taxation must, therefore, be burdened differently in the several States. Not so under the uniformity plan as to duties, imposts and excises. Upon these last the burden imposed upon the citizen of Virginia must be uniform with that which is imposed upon the citizen of California.

§ 217. A great contention has arisen as to what property in the several States is to bear the burden of direct taxation. What then are the subjects of direct taxation? One subject is positively ascertained. In the clause above quoted the language is: "No capitation or *other* direct tax shall be laid unless in proportion to the census," etc. This indicates that the capitation tax is a direct tax within the meaning of the Constitution. But the determination of what other subjects are within the meaning of the term "direct taxes"

constitutes the difficulty. This question was first raised in the leading case of *Hylton v. United States*.¹ Congress had laid a tax of a certain amount on pleasure carriages, which tax was uniform throughout the United States. The party assessed in this case contested its validity because it was a direct tax, and therefore not to be uniform, but to be according to the census apportionment. Eminent counsel argued the case, among whom was Alexander Hamilton. Among the members of the court were Judges Patterson and Wilson, who had been members of the Federal Convention, and Chase, who had been a member of the Maryland convention that ratified the Constitution. The court decided unanimously that the tax on carriages was not a direct tax, but a duty, impost or excise, which the Constitution required to be uniform.

The grounds of this decision were, in brief, that to apportion the taxes on carriages according to the census population would disastrously burden a few owners of carriages in one State, while the many owners of these in a State with even the same population would be lightly burdened, and that this gross injustice could not have been contemplated by the framers of the Constitution. Such injustice would be avoided by a uniform taxation on every such conveyance. The court intimated that the subjects of the direct tax within the meaning of the Constitution were capitation and a tax on land. This decision was followed by a number of cases holding that taxes on incomes, carriages and other personal property were not direct taxes, but were duties, imposts and excises, and were only required to be uniform.²

By the act of Congress of 1894 a tax on incomes was imposed, and the question was raised whether such tax was a direct tax to be laid according to the census apportionment, or uniform as indirect taxation, duties, etc. The argument was elaborate, as well on the original hearing as on the rehear-

¹ 3 Dall. 171.

533; *Scholey v. Rew*, 23 id. 331;

² *Pacific Ins. Co. v. Soule*, 7 Wall. 433; *Veazie Bank v. Fenno*, 8 id. 585. *Springer v. United States*, 102 U. S.

ing, and the court by a bare majority for the first time, and after a century of adverse decision, held that the tax on incomes was to be laid according to the apportionment; and there were *dicta* to the effect that taxes on personal property of all kinds were within the term "direct taxes."¹ This decision by a bare majority of the court, against strong dissent and a large number of precedents, left the question unsettled and undecided.²

As to duties, imposts and excises, and any other form of tax not included in the term "direct taxes," the rule is uniformity. But what is uniformity? This means clearly that the form of taxation must be *one, i. e.,* uniform. Two classes of such duties, imposts and excises have been usual. For instance, as to duties: These may be specific or *ad valorem*. Specific is the tax upon the thing without reference to its value; *ad valorem* is a tax upon the thing according to its value. One of these must not be used in one part of the United States and the other in another part; the same must be used everywhere.

§ 218. An interesting illustration of this is to be found in the duty on sugar. At one time the duty on sugar was according to its value under the Dutch standard, as it was called. Grades of sugar were measured by color, and the tax imposed everywhere was required to be upon the color standard. Congress some years ago estimated the saccharine strength of sugar according to the polariscope test, which claimed to measure the exact saccharine strength of each specimen of sugar, which was the test of its value. The Boston importers of sugar claimed that the polariscope used

¹ Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; same case on rehearing, 158 U. S. 601.

² The points decided were these:

1. A tax on income derived from realty is a tax on realty and therefore a "direct tax" by the old cases, and not being ratably laid according to the census is void.

2. A tax on income from municipi-

pal bonds is a tax on the State whose political agencies the municipalities are, and hence void.

3. A tax on personal estate and income therefrom is a "direct tax," and void unless laid ratably, etc.

4. All other taxes connected with these are part of the same scheme and must be held void.

in New York was different from that used in Boston, which produced a difference in duty in the two ports to the advantage of one over the other, thus destroying the uniformity established by the Constitution. The Secretary of the Treasury required that the same instrument used in all the ports should test uniformly.

An illustration of the requirements as to the direct tax is found in the direct tax laid by Congress in 1862. This was to be apportioned among the States according to the census. The tax was enforced and collected in all the States that remained *de facto* in the Union; but in many of the States which were *de facto* out of the Union, the tax was only partially collected. Nearly twenty-five years after the Civil War closed a bill was introduced in Congress to refund the tax to the States and citizens thereof who had been compelled to pay it. The objection made to refunding it was overcome by the view that the Constitution affirmatively required that direct taxes should be laid according to the census apportionment, and declared that such tax should be laid in no other way. The alternative was presented either to collect the tax from the States which had not paid it twenty-five years after it had been levied, or refund what had been levied and collected to those which had paid it. By either method the constitutional requirement would be upheld in its integrity; and as the collection after so long a time from the non-paying States would be unjust and inconvenient, Congress passed the law to refund the tax to those which had paid it, and thus established justice between all the States in the matter of the direct tax under the law of 1862.

§ 219. This clause in reference to taxation is without any express restriction except that already referred to and explained. Despite this, it has been decided that the United States cannot tax the salary of a State officer,¹ or a State municipal corporation,² or the process of State courts,³ or a

¹ Collector v. Day, 11 Wall. 113.

³ Warren v. Paul, 22 Ind. 276;

² United States v. Railroad Co., Moore v. Quirk, 105 Mass. 49; Union 17 Wall. 322; Ward v. Maryland, 12 Bank v. Hill, 3 Cold. (Tenn.) 325, *id.* 418.

railroad owned by a State.¹ These decisions rest upon the strong ground that the power of Congress to pass a tax law is restricted to a law which is necessary and proper to carry its taxing power into effect; and as the taxation of a State function by the Federal government is an infringement upon the reserved power and autonomy of the States, and as the power to tax without limitation is the power to destroy,² the execution by the United States of a power which involved the possible destruction of the State functions was not only not proper, but radically inappropriate. These decisions apply in restraint of the action of the United States government upon State functions, just as a number of decisions of the Supreme Court have restrained the power of the States from taxing any of the functions of the United States government.³ An express limitation upon the general power in this first clause is found in the provision, "No tax or duty shall be laid on articles exported from any State."⁴ This was a part of the compromise between the North and the South.⁵ But a stamp required to be placed on tobacco intended for export was held not to be a tax or duty, but only a means of identification and to prevent fraud, and valid unless perverted to raising revenue thereby.⁶

Again, is it constitutional to use this taxing power for the purpose of suppressing a business in the country and not as a means of revenue, though some revenue may be derived from it? The answer seems to be clear, that a power granted as a means of raising revenue cannot be diverted from this legitimate purpose by the indirect use of it to do what Congress has no power to do by direct taxation. The end is not

¹Georgia v. Atkins, 1 Abbott id. 171; Bank Tax Case, 2 Wall. (U. S.), 22. 200; Bank v. Supervisors, 7 id. 26.

²McCulloch v. Maryland, 4 Wheat. 316-368; Osborne v. Bank of United States, 9 id. 738, per Marshall, C. J. ⁴Const. U. S., Art. I, sec. 9, clause 5.

⁵Ante, ch. VI.

⁶Page v. Burgess (Collector), 92 U. S. 372; Turpin v. Burgess, 117

³Dobbins v. Commissioners, 16 Pet. 435; Western v. Charleston, 2

id. 504.

legitimate, and therefore the law is not constitutional.¹ It is true that where the law merely imposes the tax without disclosing the indirect purpose of its imposition, the courts may have no right to declare the law unconstitutional, though, if the purpose were disclosed on the face of the act, the courts would do so.²

Chief Justice Marshall says: ³ "Congress is not empowered to tax for any purposes which are within the exclusive province of the States." And it follows *a fortiori* that Congress is not empowered to tax so as to suppress that which is within the exclusive province of the States. The question was much discussed by one of the writers in the *Federalist*,⁴ whether this grant of power to Congress to tax was exclusive of the same power by the States. A reference to the tenth amendment will settle this question. That declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The terms of this amendment show that where particular powers of taxation, as in the case of duties on imports and exports, are prohibited to the States, then the grant of power to lay such duties is exclusive in Congress, because prohibited to the States; but all other powers relating to taxation which are not so prohibited, though they may be delegated to the United States by the Constitution, are still reserved for all needed purposes to the States respectively. Indeed, a tax may be laid by both governments on the same subject. Thus, Congress may lay a direct tax on land and a capitation tax; but this does not exclude the power in the State to lay a land tax and a poll tax. "Though a law, therefore, laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controlled,

¹ *McCulloch v. Maryland*, 4 Wheat. Wall. 655, and other cases cited by 316, and Chief Justice Marshall's Judge Cooley; *Powell v. Pennsylvania*, 127 U. S. 678.
canon of construction therein, already noted.

² *Cooley on the Constitution*, pp. 199.

57-60; *Loan Ass'n v. Topeka*, 20

³ *Gibbons v. Ogden*, 9 Wheat. 1,

⁴ Nos. XXX to XXXVI.

yet a law abrogating or preventing the collection of a tax laid by the authority of a State (unless upon imports and exports) would not be the supreme law of the land, but an usurpation of a power not granted by the Constitution. . . . The inference from the whole is, that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation except duties on imports and exports.”¹

§ 220. In the numbers of the *Federalist* above referred to, Mr. Hamilton maintains that “this concurrent jurisdiction in the article of taxation is the only admissible substitute for an entire subordination in respect to this branch of power of State authority to that of the Union.” He shows that it is impossible to restrict the powers of the Union as to taxation to any prescribed number of subjects, because the needs of the Union might require such unlimited range of taxation, and a like unlimited range must be reserved to the States, except in the matter of duties upon imports and exports. He lays down this proposition: “In the usual progress of things the necessities of a nation in every stage of its existence will be found at least equal to its resources.” He argues, therefore, that to stint its resources in the matter of the raising of revenue would be to paralyze its power to perform the duties which were entrusted to it by the Constitution. In order, therefore, to give to each government, as far as possible, the resource of unlimited taxation for the purposes confided to each, it is best to give, with a few exceptions, concurrent jurisdiction to each to an unlimited extent in the matter of subjects of taxation. And so he concludes that no law to raise revenue could be necessary and proper² which would impose a tax in any form prescribed by the Constitution for Congress which would exclude the State from laying an imposition upon the same article, unless prohibited by the Constitution to the State.

¹ Id., No. XXXIII.

² Const. U. S., Art. I, sec. 8, clause 17.

This view is finely condensed by Chief Justice Marshall in the case of *Gibbons v. Ogden*,¹ in the following language:

“Although many of the powers formerly exercised by the States are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other.”²

A question has arisen and been decided that “direct taxes,” as used in the Constitution, though in terms to be apportioned among the several States according to their respective numbers,³ and with the negative provision that “no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken,”⁴

¹ 9 Wheat. 1, 198-99.

³ Const. U. S., Art. I, sec. 2, clause 1.

² In accord, Story on the Constitution, secs. 927, 940-43.

⁴ Id., Art. I, sec. 9, clause 4.

may still be laid constitutionally upon the people of the District of Columbia, and upon the people of the Territories of the Union, according to the apportionment referred to. The language, though in terms confined to the States, is taken in connection with the general terms of the power to "lay and collect taxes," etc., as embracing the District of Columbia and Territories within the power of taxation, so as that direct taxes should be apportioned to them according to their numbers, and all other forms of taxation, as "duties, imposts and excises," should be uniform with those laid elsewhere than in the District and in the Territories.¹

§ 221. An important limitation upon the power of Congress to lay and collect taxes, duties, etc., is expressed in these words: "No tax or duty shall be laid on articles exported from any State."² This is a part of the great compromise made between the North and the South, the commercial and the planting States. At that time, as now, a large mass of the exports of the country consisted in the great staples of the South. To have left to Congress the power to tax the staples of the great exporting States of the Union would have enabled the majority in Congress to tax the minority, representing the planting States, to an oppressive extent. Thus, the power to lay duties on the exports, as well as the power to tax the article itself which was designed to be exported, was utterly denied to Congress, as a part of the great compromise.³ The latter part of the clause reads: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another." This prohibition was directed against any regulation of commerce or revenue which would make a preference between the ports of one State over those of another; as, for instance, between such ports as Norfolk and Baltimore. A preference might be given by some regulation of revenue which

¹Loughborough v. Blake, 5 Wheat.
317.

²Const. U. S., Art. I, sec. 9, clause 5.

³*Ante*, ch. VI.

would give such preference; *e. g.*, the test on sugar by the polariscope. The instrument used must be the same in all the States, so that no preference as to revenue shall be given. The same thing is involved in the latter clause. A vessel bound to or from Baltimore, obliged to enter, clear or pay duty at Norfolk, would work great injustice against the one and for the other.¹

§ 222. We come now to a question which has excited great contention. It will be perceived that the clause under consideration has an important clause interposed between the first and last provisions of it, that we have not as yet particularly noticed. The language is, "to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." The words which we have not yet considered are: "to pay the debts, and provide for the common defense and general welfare of the United States." The question arises, Do these words grant a distinct power, or do they declare only the object of the tax power preceding?

To the first branch of the question we give a negative answer; to the second an affirmative answer, for the following reasons:

1st. The structure of the sentence requires this interpretation. To "pay the debts, and provide for the common defense and general welfare of the United States," if a distinct power from the power to "lay and collect taxes," etc., should not have intervened between the power to lay and collect taxes, etc., and the qualification of that power by the words, "but all duties, etc., shall be uniform," etc. The latter branch of the sentence as a qualification of the first should not have been separated by words which grant a distinct and independent power. Such a framing of the sentence so interpreted would be a vice in grammar of which the pen of Gouverneur Morris should not be held guilty where

¹ Story on the Constitution, sec. 1014.

any other construction is open. The grammatical construction is vindicated by holding that the words "to pay the debts," etc., do not create an independent power, but only declare the object of the preceding tax power.

2d. To pay debts can hardly be said to be a political power. To lay and collect taxes is a power, and a proper power, where its object is to pay the debts of the government; and, as these words "to pay the debts" are indissolubly connected with the words to "provide for the common defense," etc., it follows that these latter words must share the fate of the words to "pay the debts," and be taken to declare the object of the preceding power and not the creation of a distinct power.

3d. This is confirmed by the report of a committee in the Federal Convention, which proposed to add to the words "to lay and collect taxes," etc., the phrase following: "for payment of the debts and necessary expenses of the United States," etc.¹ Later it was proposed to add to the tax clause, "for the payment of said debts, and for the defraying the expenses that shall be incurred for the common defense and general welfare;" which last, though disagreed to at the time as unnecessary, was incorporated in the clause thereafter, as now found in the Constitution.²

4th. Mr. Madison³ meets the charge that these words contain a grant of unlimited power to provide for the common defense and general welfare, in the following terms:

"Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution on the language in which it is defined. It has been urged and echoed that the power 'to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof

¹ 3 Madison Papers, 1398.

³ Federalist, No. XLI.

² Id. 1426-27, 1549.

could be given of the distress under which these writers labor for objections than their stooping to such a misconception.

“Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms ‘to raise money for the general welfare.’

“But what color can the objection have when a specification of the objects alluded to by these general terms immediately follows; and is not even separated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded as to give meaning to every part that will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted if these and all others were meant to be included in the preceding general power? Nothing is more natural and common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing had not its origin with the latter.

“The objection here is the more extraordinary, as it appears that the language used by the convention is a copy

from the Articles of Confederation. The objects of the union among the States, as described in Article III, are, 'their common defense, security of their liberties, and mutual and general welfare.' The terms of Article VIII are still more identical: 'All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress, shall be defrayed out of a common treasury,' etc. A similar language again occurs in Article IX. Construe either of these articles by the rules which would justify the construction put on the new Constitution, and they vest in the existing Congress a power to legislate in all cases whatsoever. But what would have been thought of that assembly, if, attaching themselves to these general expressions, and disregarding the specifications which ascertain and limit their import, they had exercised an unlimited power of providing for the common defense and general welfare? I appeal to the objectors themselves, whether they would in that case have employed the same reasoning in justification of Congress as they now make use of against the convention. How difficult it is for error to escape its own condemnation."

5th. The eighth article of the Confederation is in these words: "All charges of war, and all other expenses that shall be incurred for the common defense and general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury," etc. . . . "The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States," etc. In that instrument the language as to common defense and general welfare clearly conferred no power. It simply sets forth the objects to be provided for by the treasury of the government, which was to be supplied by requisitions upon the several States, and, under the present Constitution, by taxation by the government itself. The mode of raising the revenue is different, but the objects for which it is raised are precisely the same. So we are forced to conclude that the words used in the Articles of

Confederation and transferred to the new Constitution were intended in both to be merely declaratory of the object for which revenue should be raised, and not as the object of raising revenue in the one and a declaration of a distinct power in the other.

6th. What means "common defense?" It is common, not general—the defense of each and all; defense, a duty to each particular State—not generally as to the total area of the States united, but a defense of each. For the Constitution provides: "The United States . . . shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence."¹ What is "general welfare?" General (not common); welfare of the Union as a totality, not of each State; the welfare of the whole is the function of the Union; the welfare of each is the function of each. Upon this point the opinion of the writers on this subject is uniform. Judge Story, after asking the question with which this section begins, says:

"If the former be the true interpretation, then it is obvious that, under color of the generality of the words, to 'provide for the common defense and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers; if the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of a national character, 'to pay the debts, and to provide for the common defense and the general welfare.'"

He says this latter is "supported by reasoning at once solid and impregnable;" that it is as if it read, "the Congress shall have power to lay and collect taxes, etc., in order to pay the debts and to provide, etc.; that is, for the purpose of paying the public debts, and providing for the common defense and general welfare of the United States."² He

¹ Const. U. S., Art. IV, sec. 4.

² Story on the Constitution, secs. 907, 908.

quotes the argument by Mr. Jefferson in favor of this construction with strong approbation.¹

§ 223. But this clause was interpreted first, perhaps, by Secretary Hamilton in the Report on Manufactures in 1791. He says, in speaking of these words, “‘common defense and general welfare’ are not to be construed as a distinct grant of power, but are qualifications of the objects of the taxing power;” and adds, “the terms ‘general welfare’ were doubtless intended to signify more than was expressed or imported in those which preceded; otherwise numerous exigencies, incident to the affairs of the nation, would have been left without a provision. The phrase is as comprehensive as any that could have been used, because it was not fit that the constitutional authority of the Union to appropriate its revenues should have been restricted within narrower limits than the general welfare, and because this necessarily embraces a vast variety of particulars which are susceptible neither of specification nor of definition. It is therefore of necessity left to the discretion of the national legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems no reason for doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, *so far as regards an application of money*. The only qualification of the generality of the phrase in question which seems to be admissible is this: that the object to which an appropriation of money is to be made must be general and not local,—its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot. No objection ought to arise from this construction from a supposition that it would imply a power to do whatever else should

¹ Story on the Constitution, sec. 926. Accord: Madison's Rep. of 1798—Law, lecture 15; Miller on the Constitution, 229, note 2.

4 Madison Papers, 120, 126, 131;

appear to Congress conducive to the general welfare. A power to appropriate money with this latitude, which is granted in express terms, would not carry a power to do any other thing not authorized in the Constitution, either expressly or by fair implication." This view seems to have been followed in the message of President Monroe, May 4, 1822, on the subject of repairs for the Cumberland road. The doctrine is endorsed by Mr. Madison in an elaborate report in 1798-99, and in a message vetoing the bill for internal improvements on the 3d of March, 1817, the last day of his Presidential service, from which the following extract may be made:

"To refer the power in question to the clause 'to provide for the common defense and general welfare' would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers, which follow the clause, nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power of legislation, instead of the defined and limited one, hitherto understood to belong to them, the terms, 'the common defense and general welfare,' embracing every object and act within the purview of a legislative trust. It would have the effect of subjecting both the Constitution and the laws of the several States, in all cases not specifically exempted, to be superseded by laws of Congress, it being expressly declared 'that the Constitution of the United States, and the laws made in pursuance thereof, shall be the supreme law of the land, and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.' Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participating in guarding the boundary between the legislative powers of the General and the State governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and de-

cision. A restriction of the power 'to provide for the common defense and general welfare' to cases which are to be provided for by the expenditure of money would still leave within the legislative power of Congress all the great and most important measures of government, money being the ordinary and necessary means of carrying them into execution."

The contestants seem to have agreed upon one point: that to hold the words "to provide for the common defense and general welfare" to be a substantive grant of power, in the face of the subsequent enumeration of specific powers, would be absurd; because the indefinite words would not only enable Congress to exercise the enumerated powers, but discretionary powers without limit, except as Congress might determine what was the "common defense and general welfare." The point of divergence is, that Madison holds the words "common defense and general welfare" as a general description of the objects of the tax power, limited by and commensurate with the objects of the Constitution as defined in the enumerated powers thereafter specified; and that there can be no "common defense and general welfare" intended by the Constitution beyond what Congress has power to create, regulate and control by virtue of the enumerated grants. *E contra*, Hamilton holds that the words "common defense and general welfare" include two classes of objects. First, those which are within the scope of the subsequently-enumerated grants of power; and second, all other that Congress may deem to be for the "common defense and general welfare."

Both contestants hold that Congress has only the enumerated powers. But Madison holds that Congress can only raise money to carry out the enumerated powers, while Hamilton holds that it may do so not only for these, but for any others that it may *deem* for the "common defense and general welfare." Hamilton, therefore, as far as money is concerned, thinks the Constitution placed no limits on the objects of its appropriation, except the discretion of Congress as to

what might be brought within the words "common defense and general welfare." Madison thinks the discretion of Congress is confined to these, and that the "common defense and general welfare" must be limited to objects that may be attained by the exercise of the enumerated powers granted by the Constitution to Congress.

It would really seem absurd to impute to the framers of the Constitution a purpose to comprehend objects far beyond the powers it conferred upon the government. It is argued everywhere in the *Federalist* that power ought to be commensurate with purpose. But this construction, insisted on by Hamilton and his followers, would indicate that the Constitution contemplated the unlimited expenditure of money, to be raised by taxation under governmental power, to carry out objects which were not within the control given, or the powers committed to, Congress. Power and purpose were not commensurate, except that by this construction Congress had unlimited discretion to raise and expend money by taxation, to aid and accomplish purposes and objects that were beyond the power of Congress to effect; which involves the conclusion that the Constitution trusted Congress to spend money for objects which might be regulated and controlled by other governments, but would not trust Congress to create and regulate these objects of appropriation. In other words, Congress cannot make and control a railroad; but it may raise and appropriate money for the benefit of a corporation that is to regulate and control it. Such a construction of the Constitution is anomalous. It gives an unlimited power of raising money, to be expended at the discretion of Congress, upon any and all schemes which Congress might deem for the "common defense and general welfare," although such schemes Congress is not empowered to project or to carry into execution by any power delegated to it.

If, under the tenth amendment of the Constitution, a specific power to do a particular thing is not delegated to the United States by the Constitution, then it is reserved to the States. Such a thing is in no way within the control and di-

rection of the United States. If it be within the words "common defense and general welfare," still, as those words grant no power, Congress cannot exercise it. And yet, despite this, the construction contended for would give to Congress unlimited power to spend any amount of money to carry out a project or scheme clearly and only within the reserved powers of the States. Is it legitimate to give to the power of taxation, which is ordinarily but a means for effecting the purposes of power, the larger function of unlimited discretion in selecting objects not within the delegated power as the recipients of the benefactions of revenue? Is it legitimate thus indirectly to carry into effect an ungranted power—a power which, being ungranted and if not prohibited to the States, is reserved to them? Is not this a usurpation by indirection, through taxation, as flagrant as if it were a bald exercise of the ungranted power? Judge Story says that this construction is conformable to the proposition "to legislate in all cases for the general interests of the Union." But that proposition was never adopted, and was rejected. Is it legitimate, then, to conform the construction of the words "to provide for the common defense and general welfare" to a purpose which was proposed and rejected? It is true that Mr. Hamilton, in his draft of a Constitution, proposed that Congress should have "power to pass all laws whatsoever, subject to the negative hereafter mentioned," and that the President should have power to negative all laws passed in the State by a Governor or President, who shall be appointed by the general Government. Again, in Article VII of his scheme of a Constitution, he proposed that "the Legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defense and general welfare of the Union."¹ But this proposition of Mr. Hamilton was displaced by the provision of the Constitution which clearly enumerated the powers delegated to Congress.

¹Madison Papers, 890-892; *Id.*, Appen., p. 24.

§ 224. Let us enumerate the objections to this Hamiltonian doctrine:

1st. The reasoning of the forty-first number of the *Federalist*, which, though written by Madison, was presumably sanctioned by Hamilton, and was a contemporaneous argument to remove objections to the ratification of the Constitution, was in its spirit and meaning a refutation of the latter's doctrine.

2d. If Congress can thus by appropriation exercise this power, it would indirectly exercise a power not granted, and since denied to it. If so, what use would there be for the tenth amendment or for article I, section 1, of the Constitution? It is an anomaly to hold that any government can raise money except as a means to execute its own power.¹ Taxation is a great power; but in itself it does nothing except as it is a means for doing that which is within the powers to be carried out by a government. That a government should have this great means to execute the powers of other governments reaches the point of absurdity. Why should government be given the means to execute a power which is denied to it and confided to another? Why give it the power to help another to do what is denied to it? If Congress cannot be trusted with the grant of a power, why give unlimited discretion to Congress to raise money to enable one not entrusted with the power by Congress to perform it? Can such folly be attributed to the framers of the Constitution? It is obvious that the mass of powers which Congress would thus exercise by means of its revenue powers are powers which are reserved to the States; for the powers not delegated to the United States, unless prohibited to the States, are reserved to them. Thus it would follow that the revenue to be expended by Congress under this construction would be expended for the execution of powers which were reserved to the States. The effect then would be, that while Congress is denied the particular power, it could effectually execute the power and invade the domain of State reservation by the expenditure of money; and con-

¹Story on the Constitution, sec. 930.

ditioning the expenditure of money upon the substantial concession of power would, through money, virtually absorb the autonomy of the States and consolidate the whole governmental system into centralism. That Congress cannot, through appropriations under the tax power, include purposes within the reserved powers of the States, is not only clear upon reason, but is distinctly stated by Chief Justice Marshall in *Gibbons v. Ogden*,¹ in a passage already quoted. He says: "Congress is not empowered to tax for those purposes which are within the exclusive province of the States."

The Chief Justice argues that, though the State and the United States tax the same subject, they exercise diverse powers, because each taxes for the objects confided to it, and neither can tax for the powers confided to the other. And in that connection it was that he used the sentence above quoted. Therefore, though Congress might deem that the exercise of a State power was in a certain sense for the "common defense and general welfare," it could not exercise it, because the purpose was in the exclusive province of the States, and reserved to them, because not delegated to the United States. A very conclusive argument on this point is derivable from the language of the eighth article of confederation, for which this clause is an unquestioned substitute.

That article provides that all expenditures for the common defense and general welfare "shall be defrayed out of a common treasury, which shall be supplied by the several States," etc., and raised by their own system of taxation. This money, so derived to the United States from the several States, is to be devoted to the common defense and general welfare; just as under the tax clause of the Constitution the revenue derived from such taxation is to be applied to the common defense and general welfare. The mode of raising the money is different; the object, to provide for the common defense and general welfare, is the same. What would have been thought of the Congress of the Confederation had it taken the money supplied by the several States

¹9 Wheat. 199.

and expended it for State purposes in aid of State education, under the idea that all of these might be considered by Congress as for the common defense and general welfare? That the States should send to Congress their revenue for Congress to send back to them to be expended for State purposes would be a great and absurd anomaly. How, then, can it be supposed that the revenue derived by Congress under the present Constitution can be properly applied to pay for carrying into execution the reserved power of the States? It is true that Judge Story on this point has argued that in practice the Congress of the Confederation did expend money outside of the limits of their powers, but that did not make their action proper or constitutional; and he fails to show any sanction by the States or the people of that period.

§ 225. Under these famous words, then, for what may the revenues of the Federal government be appropriated?

First. To pay the debts of the United States. The proposition was made in the convention that Congress should pay the debts of the individual States incurred for the common defense and general welfare; but that provision was excluded.

Second. To provide for the common defense and general welfare. That is, as has already been explained, not only for the defense of all but for each State.¹ In the enumerated powers we have all these provided for in the powers of Congress to raise and support armies, to provide and maintain navies, to train and discipline the militia, to call them out to suppress insurrection, to repel invasion and to enforce the laws; and the duty of defending each State against invasion and against domestic violence.

Third. As to the general welfare. This is provided for by the powers over commerce, the coinage of money, the establishment of courts, etc. And the appropriation of money to each and all of these is clearly constitutional.

Even by the Hamiltonian construction the appropriation of money for local benefit, and for purposes confined to in-

¹ Art. IV, sec. 4.

dividual States and communities, would not be for the general welfare. His theory imposes the word "general" as a limitation upon the otherwise unlimited discretion of Congress; and such a limitation is valuable as far as it goes, but the limitation we insist upon goes further. Nothing is to be provided for by appropriation of money which is not to conduce to the common defense and general welfare of all, as especially provided for by the delegation of the enumerated powers to Congress.

Another view may be presented. If the United States, with a view to promote the common defense and general welfare, under the construction we are now considering, should use the power of another, whether that other be a man, corporation, municipal or otherwise, or a State government, to accomplish any purpose not within the enumerated powers, and furnish the means in money to that other to do so, does not the United States thus exercise through that other the ungranted power? *Qui facit per alium, facit per se.* If Congress furnishes the means essential to the exercise of that power by such other, is it not sophistry to say it does not exercise the power?

All admit that to infer for Congress the unenumerated power to do a thing that Congress may in its discretion deem to be for the common defense and general welfare is out of the question. For such a construction, Judge Story says, would be to charge the authors of the Constitution "either with premeditated folly or premeditated fraud." How can the exercise by Congress of an unenumerated power, by furnishing the means in money to a person, corporation or State (which is the *sine qua non* to its exercise), be held to be anything but a usurpation of power? It could be justified only by the exercise of the ungranted power through another as agent by an appropriation of money unlimited except by the discretion of Congress — a discretion that even the judiciary cannot call in question.

This view is confirmed when it is considered that Congress may appropriate the money to the scheme with or

without the reservation of power to supervise and intervene to see that the means are properly applied. But if appropriated without such reservation, then Congress would give away its discretion to another, to use the money so appropriated for the common defense and general welfare as that other might determine. This would be an unconstitutional abandonment of duty and breach of trust. If, on the other hand, Congress should reserve the power to supervise and intervene, then, to that extent, the government would in fact be exercising a denied and unenumerated power. In other words, it is inconceivable how government can appropriate money to aid the exercise of an ungranted power by any other than itself without a breach of trust, unless it directly exercises the power itself, or indirectly in effect by the supervision and control of its use by the agent holding the power.

It is a political anomaly to hold that the Constitution delegated to Congress the power to delegate to any other than itself the control of money to be used to promote the general welfare. For Congress to do so would be to abdicate its political power and to violate its trust duty. On the other hand, to use the public money as a means to the exercise of an ungranted power by controlling its use would be in reality to exercise a power which has been denied to it by the Constitution. It is surprising how this sophistical device has been upheld by learned commentators, for it is obvious that, by such construction of the Constitution, Congress may range with no limit but its discretion through the realms of reserved and ungranted powers by means of a clause to tax *ad libitum* and appropriate at will the money of the people to the promotion of anything through other agencies than its own and to the accomplishment of anything it may deem to be for the common defense and general welfare; for this, in effect, is worse than if the words "to provide for the common defense and general welfare" were held to grant the unlimited power claimed, as it incites to profuse expenditure and excessive taxation as the only avenue to the unlimited usurpation of ungranted powers.

How vain and foolish is Madison's argument in the forty-first number of the *Federalist*, which denies power under the words "common defense and general welfare," if it only means to deny those powers when they do not need money to execute them, but admits the unlimited grant of power if to be made effectual by the appropriation of money! This argument was used to reconcile the people to the ratification of the Constitution by showing that these words did not grant to Congress power only limited by the discretion of that body. But if in expressing this meaning he *suppressed* the meaning now asserted by this construction, that Congress had such unlimited powers to be exercised through unlimited expenditure, the effect of the express argument and this suppressed construction would fix upon the writers of the *Federalist*, in the language of Judge Story, "premeditated folly or premeditated fraud." Mr. Madison has again and again repudiated any such construction. Why should the interpreters of the Constitution give it a meaning which would make the argument used by Mr. Madison a fraud upon the people?¹

§ 226. The original argument of Mr. Madison is as we have seen it in the forty-first number of the *Federalist*, and is not potential merely as the authority of a great man who was a member of the Federal convention which framed the Constitution, as well as of the Virginia convention which ratified it, but because it was the accepted construction by the writers of the *Federalist*, of whom Mr. Hamilton was one, in which this argument was used to remove the fears of the people that the Constitution might be so construed as to give unlimited discretion under the use of the words "to provide for the common defense and general welfare." He speaks of the construction of those words made by the opponents of the Constitution as "stooping to such a misconstruction," and adds: "Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general expressions just cited, the

¹ Mr. Madison's veto message (already quoted), March 3, 1817.

authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing authority to legislate in all possible cases. . . . But what color can the objection have when a specification of the objects alluded to by these general terms immediately follows; and is not even separated by a longer pause than a semi-colon? . . . Shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the mere doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted, if they and all others were meant to be included in the preceding general power?" This language is as pertinent to show that the general terms "common defense and general welfare" were defined and limited by the subsequent enumeration of powers, when those words merely declare the objects of the taxing power, as if they had been the expression of a distinct and independent power.

He then proceeds to show that these words were taken from the Articles of Confederation, and that the objectors to their use in the Constitution would never have given such an extensive interpretation to those words in the Articles of Confederation as they proposed to attribute to them in the Constitution. And if so, he says: "How difficult it is for error to escape its own condemnation!"

For in the Articles of Confederation those words were strictly limited by express grants, because powers not expressly granted to the United States by those articles were reserved to the States. These words when put into the Constitution, therefore, on which, a few years after, the tenth amendment was engrafted, made it impossible to give to these general terms the unlimited meaning which by this construction was attributed to them, in the face of the specific enumeration of powers just succeeding. The powers enumerated were all with a view to the "common defense and general welfare," and were parts of the sentence which em-

braced the whole of the eighth section of the first article. Upon what rational ground, then, can the general terms defining the objects of a power be stretched beyond the objects indicated in the enumerated powers granted by that section. Mr. Madison, in his veto message, makes this important statement: "Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and the State governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision." In other words, the unlimited discretion of Congress would leave to their judgment the exercise of any power through the appropriation of money which Congress deemed to be for the common defense and general welfare; and such action would be beyond judicial decision that it was unconstitutional. Judge Story attempts to sustain his view by reference to the proceedings of the convention, but without success. Let us refer briefly to these.

§ 227. The first scheme of a Constitution was proposed by Mr. Randolph in the form of resolutions. The first resolution was that "the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, 'common defense, security of liberty and general welfare.'"¹ These resolutions, after debate, were referred to a committee. The form in which the resolution as to the power of Congress was referred was, "That the National Legislature ought to possess the legislative rights vested in Congress by the Confederation; and moreover, to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."²

The report of the committee upon the several propositions

¹ Madison Papers, 731.

² Id. 1220-21.

referred to them contained the proposition as to taxation as it had been proposed in Mr. Pinckney's plan, in these words: "The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises."¹ Livingston made a report in reference to the duties of the several States, that "The Legislature of the United States shall have power to fulfill the engagements which have been entered into by Congress, and to discharge, as well the debts of the United States, as the debts incurred by the several States, during the late war, for the common defense and general welfare."²

Subsequently Mr. Morris proposed as a substitute for the proposition as to engagements, etc., which was adopted, the following: "The Legislature *shall* discharge the debts and fulfill the engagements of the United States."³ Subsequently the power to lay and collect taxes was amended so as to read: "The Legislature *shall* fulfill the engagements and discharge the debts of the United States; and shall have the power to lay and collect taxes, duties, imposts and excises."⁴ This was agreed to, but afterwards reconsidered.⁵ Upon reconsideration it was moved to postpone this clause in favor of the following: "All debts contracted and engagements entered into by or under authority of Congress shall be as valid against the United States under this Constitution as under the Confederation."⁶ This was adopted by a large majority, and is substantially what is in the present Constitution as adopted.⁷ Mr. Sherman proposed to modify the provision as to laying taxes by adding: "For the payment of said debts, and for the defraying the expenses that shall be incurred for the common defense and general welfare." His proposition was disagreed to as being unnecessary.⁸ But afterwards, in the report of Mr. Brearly, the provision was reported in this form: "The legislature shall have power to

¹ Id. 1232.

² Id. 1373.

³ Id. 1402.

⁴ Id. 1412.

⁵ Id. 1416.

⁶ Id. 1426.

⁷ Const. U. S., Art. VI, clause 1.

⁸ Madison Papers, 1426-27.

lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States,"—substantially Mr. Sherman's proposition which had been disagreed to. This was adopted *nem. con.*¹

§ 228. This is all that appears upon the records as detailed by Mr. Madison of the proceedings of the convention. The whole record gives no ground for the conclusion stated by Judge Story, that "it conformed to the spirit of that resolution of the convention which authorized Congress to 'legislate in all cases for the general interests of the Union.'"² So far is this from being true, the resolution that Congress should legislate in all cases for the general interests of the Union, though informally offered, was never finally adopted by the convention. So far from it, the proposition of Mr. Hamilton, already referred to, and which was substantially that stated by Judge Story, was never even voted upon, but was merely suggested by him and never regularly proposed. The record, if it proves anything, proves only what we have contended for, that the words "to pay the debts," as one of the objects of the power of taxation, were associated with the words "to provide for the common defense and general welfare," used in the Articles of Confederation under which those debts had been contracted, as indicating that the constitutional limitations under both instruments of the objects defined in the words "common defense and general welfare" were those which were indicated by the granted and enumerated powers delegated to Congress.

§ 229. We have been thus full in respect to this celebrated theory of Mr. Hamilton, that while Congress cannot claim unlimited discretion in the exercise of powers which it may choose to consider for the common defense and general welfare, yet it may do so as to the objects of the appropriation, because this theory has of late years assumed dangerous prominence in the administration of the Federal govern-

¹ Id. 1485-88.

² Story on the Constitution, sec. 930.

ment. The government is induced to enlarge its taxation in order to accomplish the objects which, by loose construction, are embraced in these celebrated words.

The canon of Judge Marshall is often referred to: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are clearly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." This makes the constitutionality of an appropriation depend upon whether the object and end is legitimate and within the scope of the Constitution. The appropriation of money may be held to be the chief and legitimate means by which every government carries its powers into practical effect. It would seem to be a sound principle that if the government can use the money it raises by taxation or otherwise only for the purpose of executing the powers vested in it, to use it for other purposes would not be legitimate. If government be a trustee delegated with power to raise money from its people, and to exercise powers for their use, the conclusion is inevitable that it is a breach of trust, contrary to the spirit if not the letter of its charter, to spend the money of its people for ends other than those designated in the Constitution.

This general principle, applicable to all governments as sound and just, must be applied to the Federal Congress, which by universal admission and judicial decision is a government of limited powers — limited by the Constitution and those which are granted to it. "The government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication."¹

§ 230. These general views confirm the soundness of the construction given to the clause of the Constitution we have been considering. To speak of the government as a government of granted powers, and yet to hold that its greatest

¹ *Martin v. Hunter*, 1 Wheat. 304, 326.

power, that of unlimited taxation, can be applied to the execution of powers not granted nor enumerated in the Constitution, but to such objects as Congress may deem to be for the common defense and general welfare, would make it substantially a government of unlimited powers. It is well said by Mr. Justice Miller: "Of all the powers conferred upon government, that of taxation is the most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited."¹

The theory of construction which we are combating involves the historic conclusion that the States, which were jealously guarding their reserved powers by expressly enumerating the powers delegated to the Federal government, agreed under this power of taxation, in the face of its liability to abuse by exercise for objects and purposes which were ungranted, that Congress might nevertheless, at its discretion, assume and execute them through the power of appropriation. It is absurd to suppose that such was the purpose of the States which framed the Constitution. It is not surprising that the ingenious and inventive intellect of Mr. Hamilton, who had been defeated in the convention in all his efforts to grant unlimited power to Congress, should have been led to adopt an interpretation of this clause of the Constitution which in effect would accomplish the object in which he was foiled in the convention. He favored a strong government with large powers, believing it to be essential to the success of the system; and naturally, with his bold and ardent temperament, sought to establish a policy which the terms of the Constitution did not authorize, by a strained, and, as we have shown, an improper interpretation of this taxation clause.

§ 231. It only remains to say that the construction we insist on is fully sanctioned by the fact that the powers enumerated in the Constitution² provided means for the defense

¹ *Loan Ass'n v. Topeka*, 20 Wall. 663.

² Const. U. S., Art. I, sec. 8; *Id.*, Art. IV, sec. 4.

of all and each of the States of the Union fully and definitely; for the establishment and organization of the executive and judicial departments of the government; for the regulation of commerce, coinage of money, postal establishment, and treaties with foreign powers,—all of which are dependent upon the taxing power, and are comprehended within the words “common defense and general welfare.” The construction here insisted on, therefore, gives full force and meaning to all the powers of the government which may need the appropriation of money; but allows no appropriation of money beyond the prescribed powers in the terms of the Constitution. This construction, which thus gives full effect to Federal power, and to all which the Constitution intends and embraces under the terms “common defense and general welfare,” only checks that power which may be assumed upon the mere discretion of the legislative body. This is essential to avoid centralism and to preserve in its integrity the autonomy of the States.

It is proper to add that Hamilton and his followers attached to his theory the qualification that though Congress may appropriate money for what it deems the general welfare, though not within the enumerated powers, the word *general* makes a limitation upon the power which excludes all appropriations for what is special or local, and not general throughout the Union. But the practical effect of the rule has been to include special and local objects within the word, when many such special things in many localities may together be deemed for the general welfare, in accordance with the idea that many particular welfares may be held to be a general welfare. And it further may be assumed that the Hamiltonian view would differentiate private and public benefit as a line of demarcation between special and general welfare. For these private benefactions would, *a fortiori*, not be for the general welfare, unless we are prepared to adopt paternalism simple and pure, and hold general welfare to mean an infinite number of special welfares.

§ 232. Let us now consider some of the forms in which this question has presented itself.

1st. Can bounties on products be paid, in the form of appropriations, to aid one or more of the interests of private persons? Does the fact that such industries aid partially the general welfare justify the public aid through taxation to mere personal industries? Is it proper to make appropriations for the unfortunate victims of overflows, fire, grasshoppers, and the like, in order to promote the general welfare? Does help by public money to individuals who may need it elevate such a case to the promotion of the general welfare? Do a number of such particular cases constitute general welfare? If so, how many such is required to make it general. Some one says that the general welfare is made up of the welfare of private individuals; but are not these appropriations for private benefit the principal object, while the public welfare is merely the incident?

Let us examine this question in the light of judicial authority. In *Fletcher v. Peck*¹ Chief Justice Marshall said: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power. And if any be prescribed, where are they to be found, if the property of an individual fairly and honestly acquired may be seized without compensation." And Chief Justice Chase adds in the *Legal Tender Cases*,² "And if the property of an individual cannot be transferred to the public, how much less to another individual." In accord with these declarations, the late Mr. Justice Miller, in *Loan Ass'n v. Topeka*,³ speaks with great force in these words:

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such powers which grow out of the essential nature of all free governments; implied reservation of

¹ 6 Cr. 135.

² 20 Wall. 655.

³ 12 Wall. 581.

individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B.

“Of all the powers conferred upon government, that of taxation is the most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people would in some instances be at the disposal of the government.

“The power to tax is therefore the strongest, the most pervading, of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall in the case of *McCulloch v. State of Maryland*, 4 Wheat. 431, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent., imposed by the United States on the circulation of all other banks than the national banks, drove out of existence every State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

“To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it

upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

“Nor is it taxation. A ‘tax,’ says Webster’s Dictionary, ‘is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state.’ ‘Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.’

“Coulter, J., in *Northern Liberties v. St. John’s Church*, 13 Pa. St. 104, says very forcibly: ‘I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose.’

“We have established, we think beyond cavil, that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

“It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interfering is cogent.” . . . “But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner, are equally promoters of the public good,

and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

§ 233. Several cases are cited by the justice in illustration of this. A town meeting voted the town's credit to the amount of ten thousand dollars to certain individuals if they would invest twelve thousand dollars in certain mills, etc., to be built in that town by them. Provision was made to secure the town by mortgage on the mills. The Supreme Court of Maine held that this was not a public purpose, and the town could levy no taxes in aid of the enterprise, and could issue no bonds for the purpose, though an act of the legislature had ratified the vote of the town.¹ The disastrous fire in Boston in 1872 gave rise to the passage of a law by the legislature of Massachusetts which authorized the city to issue its bonds which were to be loaned under proper security by the city to owners of the ground on which the buildings had been destroyed by fire, to aid them in rebuilding. The court held the law unconstitutional as authorizing taxation for what was not a public purpose.²

These decisions of the States, sanctioned by the high authority of the Supreme Court in reference to the limitations upon State power, are, *a fortiori*, applicable in principle to the limited and enumerated powers of the Federal government. Besides, the fifth amendment of the Constitution, which vested Congress with the power to take private property for public use upon just compensation, involves the negation of power to take private property for private use without compensation. Judge Cooley³ takes the same view, and cites a case where a tax was laid to supply with provisions and seed

¹ Allen v. Inhabitants of J., 60 Me. 124. 350; Whiting v. Fond du Lac, 25 id. 185.

² Lowell v. Boston, 111 Mass. 484. ³ Cooley's Constitutional Law, See also Jenkins v. Saunders, 103 p. 59. Mass. 74; Curtis v. Whipple, 24 Wis.

such farmers as had lost their crops, which was held unconstitutional.¹

§ 234. A question has of late years arisen as to the power of Congress to appropriate money to aid public schools in the States. And it is sought to sustain it on the ground that, though the appropriation to each State is a local benefit, yet an appropriation to all the States would make a general welfare. It is conceded that the government itself could not establish an educational institution in the State, that being a power reserved to the State itself. About this there would seem to be no doubt. And yet under the general welfare clause, while not claiming to exercise the power, yet it is claimed to be within the Hamiltonian doctrine for the appropriation of money. It is too obvious to escape observation that the appropriation of money must be followed, as was proposed, with some supervision over its expenditure, and as to the system of education to be pursued. Indeed it is clear that Congress ought not to appropriate money for a useless system of education; and if Congress intervenes as to the system, because of the appropriation of money for the purpose, it would be claiming in some degree the right to exercise the denied power—denied to Congress, and reserved exclusively to the States. In such a case the language of Chief Justice Marshall in *Gibbons v. Ogden*² is applicable: “Congress is not empowered to tax for those purposes which are within the exclusive province of the States.”

§ 235. 2d. Can the tax power be used for other than revenue purposes? It has thus far been shown that both schools of construction hold it to be a revenue power—a power granted to raise revenue; and the divergence of opinion has been on the question of the power of appropriation. We come now to consider the question whether this power of taxation for revenue purposes can be used, not to raise revenue, but, by pretending to raise revenue from a particular subject of taxation, to lay a prohibitory duty upon that

¹ *State v. Osawkee*, 14 Kan. 418.

² 9 Wheat. 199.

which may be imported, in order to give a monopoly to the product made at home.

A protective duty on an article may be differentiated from a revenue duty by this course of reasoning. The revenue raised by a duty on article A is a result of two factors — the rate of taxation and the amount imported. The formula may be thus stated: $R(\text{revenue}) = D(\text{duty}) \times I(\text{import})$. As the duty increases, the import will decrease, because the increase of price will decrease consumption. When the duty is nothing, the revenue will be nothing, however great the importation. When the importation is nothing, the revenue will be nothing, however great the duty. And as importation falls off with the increase of the rate of duty (until the duty becomes prohibitory), by so increasing the price of the import as to prevent any consumption, it follows that between the point of no duty and the prohibitory rate there will be an ascending scale of revenue to a maximum point of revenue, and a descending scale of revenue from that maximum to the point of prohibition. So that on either side of that duty which raises the maximum revenue on any article, there will be a lower and a higher duty which will raise the same amount of revenue.

Therefore, as no higher duty ought to be laid than is needed to raise the requisite revenue on a particular article, it follows that the true revenue duty is the lowest duty which will bring the required revenue. To lay the higher duty to raise the required revenue, instead of the lower, which will achieve the same result, is an oppressive violation of right, in making the burdens heavier than the needs of the government require for its support. Such higher duty is not a revenue measure, but is a needless limitation on consumption, oppressive to the citizen, and an improper restriction upon freedom of commerce. In other words, the lowest rates of duty which will secure the required revenue may be termed a revenue tariff; the highest rates securing the same will be a protective tariff. The former enlarges consumption, the latter diminishes it, and both bring the

same amount of revenue. The one decreases the comforts of the people by decreasing ability to consume; the other increases their comforts by enlarging their capacity of consumption. If the power to lay and collect duties be, as its terms import, a power to raise revenue, and Congress can only pass laws necessary and proper to raise revenue required from that article, then it is clear that it is neither necessary nor proper, but the reverse, to lay the higher duty on the article rather than the lower duty, when both produce the same revenue.

But is there a power to lay the higher duty rather than the lower, because thereby a class in the community who are manufacturing the product which is being imported subject to the duty is encouraged and benefited? The difference between the lower duty and the higher duty, both of which produce the same revenue, is the measure of taxation laid upon the consumer, not for the purpose of revenue, but for the purpose of giving to the domestic producer to that extent the advantage over his foreign competitor. It is additional taxation laid upon the citizen, not to furnish revenue to the government, but to give a benefit and advantage to the domestic producer of the article. Can such legislation be justified under the revenue power? Is that the exercise of the power of taxation to raise money to pay the debts and provide for the common defense and general welfare?

It is obvious it cannot be, for the same revenue would be raised by the lower duty. We are forced to conclude, therefore, that that duty was laid for the private benefit of the producer of the domestic article.

§ 236. It is said that this is not the appropriation of money out of the treasury for private benefaction; but it cannot be denied that it is a burden laid upon a large class of consumers for the benefit of a special class of producers. If a municipality, as we have seen, cannot tax the people to call into existence or to encourage a class of existing manufactures, can the Federal power of taxation be used for any such purpose under the pretext that it is for the general welfare?

It is a general welfare in the sense of being a particular benefit to one class; but where is the general welfare when that is done at the expense of another? And if it shall be said that the duty in such cases, if collected, does not go to the manufacturer, we answer, but the process is that the consumer pays the additional price for the domestic article by reason of the prohibitory duty on the foreign one, by which the tax imposed, though never collected by the government, really is transferred directly to the manufacturer. So that in either event it is the use of the power of the government by taxation to transfer property from A to the benefit of B.

The cases already cited are clear demonstrations of the unconstitutionality of such a direct process; but shall the indirection in the use of the power save the government that so uses it from condemnation as a perverter, if not usurper, of power by so using it as to tax one man for the benefit of another? Does it not, in the potent language of Justice Miller, "lay one hand on the property of the citizen, and with the other bestow it on favored individuals to aid private enterprise and build up private fortunes;" and is it "any the less robbery because it is done under the forms of law, and is called taxation?"

That such legislation is inappropriate according to the meaning of the terms "necessary and proper" is obvious from the fact that it is contrary to a fundamental principle of our American institutions, and in fact to the express language of the fifth amendment of the Constitution of the United States. The eminent domain of a government consists in its power, through taxation or enforced condemnation, to take the property of the citizen for public use. In the fifth amendment it is provided: "Nor shall private property be taken for public use without just compensation." The owner of the property may, through the public use, share in the benefit of its dedication to the public; but he must be fully compensated for the taking of his property, in the loss of which the public does not share. The public

may buy his private property, which is alike valuable to him with all his other fellow-citizens. This language involves the affirmation that private property may be taken for public use upon just compensation; but it involves an absolute negation that private property shall be taken for private use, with or without compensation.

§ 237. What is a protective duty? It takes the private property of the consumer by taxation, or through the device of prohibitory duties, and gives it to the producer. This is taking the private property of the consumer for private use, and does not even give him compensation. So that if it be unconstitutional to take private property for public use without compensation, *a fortiori* is it the height of unconstitutionality to take the private property of one man for the private use and benefit of another without any compensation at all. It is therefore inappropriate, and the law which lays such a duty is neither necessary nor proper to carry out the granted power, but is the exercise of a despotic authority to seize the property of the citizen and dedicate it to the use of another without any compensation to the party who is robbed. In the language already quoted, "This is none the less robbery because it is done under the forms of law, and is called taxation." Taxation for revenue only is therefore the foundation of all true liberty. Taxation perverted from this purpose to the object of protection to any class, directly or indirectly, is not only unauthorized by the Constitution, but is a violation of right and justice, and of the fundamental principles and very life of the Constitution itself.

These views, though not sanctioned by all the public writers upon this subject, have the sanction of one of the most eminent among them. Judge Cooley says:¹ "Constitutionally a tax can have no other basis than the raising of revenue for public purposes, and whatever governmental exaction has not this basis is tyrannical and unlawful. A tax on imports, therefore, the purpose of which is not to raise

¹ Cooley on the Constitution, pp. 57, 58.

revenue, but to discourage and indirectly prohibit some particular import for the benefit of some home manufacture, may well be questioned as being merely colorable, and therefore not warranted by constitutional principles."

He says that as it is a duty from which revenue may be derived, the judicial power, where the motive of laying does not appear on the face of the act, cannot condemn it as being unconstitutional; but it is none the less a violation of the Constitution by the legislator who knows its object and levies the duty from a motive not justified by the Constitution. It may be added that when the protection of private enterprise is not through the agency of protective duties, but assumes the bolder form of taxation to put money into the treasury for appropriation to the payment of bounties for private enterprise, the features of unconstitutionality of which Judge Miller speaks are obvious on the very face of the law; and that such appropriation for private enterprise of public money obtained by public taxation is "none the less robbery because it is done under the forms of law, and is called appropriation."¹

§ 238. 3d. When this tax power is used not for revenue purposes, not in laying a tax in order to collection, but to lay the tax, as Chief Justice Marshall says, "to destroy" the subject, it brings up a class of questions which have found illustration in the acts of Congress in the last twenty years. This is the idea that the unlimited power of Congress to tax any and every subject of taxation at its discretion may be used when no revenue is needed, by bearing so heavily upon the product of industry or upon the article of property in the possession of a citizen that his industry will be a loss to him if prosecuted, and his property substantially confiscated. Is such an exercise of the power of taxation constitutional? If it is a power given to raise money to pay the debts, and provide for the common defense and general

¹ The case of *Gay v. United States*, 163 U. S. 427, does not directly determine this question, and has been decided since the above was written.—EDITOR.

welfare, is it a legitimate exercise of the power to lay a tax which cannot be collected, and was never intended to be collected, which destroys the subject of taxation, which subject of taxation is beyond the control of the United States, and is under the reserved and exclusive control and protection of the States ?

The Supreme Court has decided in *United States v. Dewitt*,¹ that an act of Congress making it criminal for a citizen to mix for sale, etc., certain explosives was unconstitutional. Chief Justice Chase said: "The questions certified resolve themselves into this: Has Congress power under the Constitution to prohibit trade within the limits of a State ? . . . Standing by itself it is plainly a regulation of police." He adds: "As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as, for example, in the District of Columbia. Within State limits it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion."

The question then confronts us, if Congress cannot by direct action constitutionally put down and prevent the sale of an article in a State, can it by the indirection of the taxing power seek to destroy what the Constitution prohibits it to touch? It may therefore be held as settled, that if Congress cannot destroy any industry or business or property in a State which is within the exclusive province of the State, it cannot use the power of taxation vested in it for the purpose of raising revenue to pay the debts, etc.—to do that which it has no power to do otherwise.

In other words, it cannot pervert the use of a power given for one purpose into an instrument for accomplishing another purpose which is expressly denied to it. It cannot do

¹ 9 Wall. 41.

by indirection what under the Constitution it has no power to do by direct means.

§ 239. A few additional remarks may be proper in respect to the general powers of the government in the matter of taxation and appropriation.

1st. The advantage the government has in the usurpation of power in taxation is that the people are reconciled to it because it is done by indirect taxation, while the States have to raise their revenue by direct taxation.

2d. The mistake that the framers of the Constitution made in the matter of direct taxes lay in apportioning them according to the population, and the inequality of such tax at this time.

3d. Our system of permanent tax laws, to which George Mason objected very earnestly in the convention, which fastens upon the country a system of taxation permanent until it can be repealed, really destroys the relation between taxation and representation. In England it is not so. Any tax which is offensive to the people to-day may be repealed by the House of Commons to-morrow.

4th. Judge Story says that except this clause there is no power to appropriate money given anywhere in the Constitution. So far from it, the co-efficient power¹ does it all. This is apparent; for the power to lay and collect taxes, pay the debts and provide for the common defense and general welfare, when restricted to those objects as prescribed by the enumerated powers, includes not only the appropriation of money, as defined in the enumerated powers, but in the laws which Congress may pass which are necessary and proper to carry into execution the enumerated powers, and all other powers vested in the government, or in any department or officer thereof. This involves the right to pass all laws for the appropriation of money for raising armies and navies; for carrying on war; for defending each State against invasion; for the postal establishment; for the government of the District of Columbia and the Territories; for the establishment of courts and the payment of judges and judi-

¹ Const. U. S., Art. I, sec. 8, ch. 18.

cial expenses; appropriations for the executive department and all its officers, from the President down,—these are all for the common defense and general welfare, and appropriations for all of these are included in the laws which are necessary and proper for carrying the whole government machinery into full effect.

§ 240. It is a question of grave doubt whether the Constitution, in apportioning direct taxation to population, did not commit a grave error, which in the present condition of the country might lead to gross injustice. Judge Story, in his work,¹ has commented upon this. The question was very much discussed in the Continental Congress before the adoption of the Articles of Confederation.² The rule of apportionment adopted by the Articles of Confederation was “in proportion to the value of all land within each State granted to or surveyed for any person, as such land, and the buildings and improvements thereon, shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct and appoint.”³ The Constitution, as we have seen, apportioned it according to population. It was thought that either of these would approximate a just basis of apportionment, and perhaps at the time of the adoption of the Constitution population was a just basis—certainly in reference to capitation taxes. But to hold that capacity to pay taxes is in proportion to population at the present day is absurd.

By the last census the true valuation of property *per capita* ranges from \$348 in South Carolina to \$3,941 in Nevada. If, therefore, each person by direct taxation is to pay the same amount of taxes, then the South Carolinian will pay on \$348 of property the same amount of taxes as a citizen of Nevada will pay on \$3,941 worth. In other words, the citizen of South Carolina will pay ten times the rate of tax that the citizen of Nevada does.⁴ New York has ten times as much

¹ Story on the Constitution, secs. 993–97.

³ Eighth Article of Confederation.

² 1 Madison Papers.

⁴ 11 Census of U. S., Part II, Val. and Tax., p. 16.

property as Virginia, yet under this system would only pay three and a half times as much tax. Massachusetts, with a little more than three times the property, would pay the same tax. This would be grossly unequal. It is really taxing men by the poll without regard to the property. And if the new construction of the Constitution as to the subjects embraced within direct taxes on all the subjects of real and personal property be upheld, this disparity of burden would be most unjust. The only relief from this inequality is to restrain direct taxes within a narrow range of subjects and so extend the range of subjects embraced in the requisition that such subjects shall be taxed uniformly.

In the Federal Convention one man only, George Mason, seemed to have feared and sought to prevent the danger of a perpetual revenue, which he said "must of necessity subvert the liberty of any country."¹ Mr. Rutledge from his committee reported favorably a clause "that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than — years."² It does not appear that this proposition was ever voted on; but it finds no place in the Constitution. The consequence of this is, that whereas the House of Representatives was given the initiative power in respect of taxation, because it is especially the representative of the taxpayers, yet by providing a permanent revenue law it became unable to inaugurate any system of revenue which it could hope to pass, as a change in the permanent system of taxation, unless it has the concurrence of the Senate and the President. The consequence has been that, whether right or wrong, the efforts of the House of Representatives in the last twenty-five years have been thwarted by the non-concurrence in their bills for raising revenue by the other branches of the government.

§ 241. On the other hand, a revenue bill, if it expired by limitation, would have to be again originated in the House, and passed in order to raise revenue. This would

¹ Madison Papers, 1356.

² Id. 1398.

make the taxation of one generation by another absolutely impossible. The present system of permanent revenue bills makes the taxation of a former generation without the consent of the people to be taxed permanently oppressive, unless the three departments of the government concur in overthrowing it. The three departments ought really to concur and be required so to do in reference to any taxation of the people. The checks and balances which were intended to be provided against unjust taxation by a system of permanent revenue are checks and balances against the overthrow of a bad system of raising revenue. Thus oppression is protected against change instead of liberty.

In this respect how different is the operation of the British system. If the House of Commons desires a change in any tax upon any article, it has only so to declare and all the governmental machinery yields to its single and undisputed will. With us the House that is the representative of the taxpayers may be thwarted for generations in its effort to remove an unjust tax by the opposition of the Senate or the President, and the unjust tax can only be removed when all three concur in a law to do so. This evil does not inhere in the Constitution itself, but in the practice of the government under it. And the answer is always made against any proposition to change the system of taxation that it will disturb the business of the country. So much the more reprehensible is any system of taxation that is based upon a principle which so entangles the business of the country with the revenue policy of the government as that unjust taxation may be permitted to be permanent, lest it shall disturb the business of individuals whose interests are allied to taxation.

These considerations suggest a better line of policy, which will divorce governmental exactions from the business of the people in so far as it is possible, and then the government will be free to lift the burdens of taxation from the people without injuring the business of any.

In construing tariff laws the commercial understanding

of terms used may be taken by the courts as a guide to their meaning. Where those commercial designations are the result of established usage in commerce, definite, uniform and general, then this rule prevails; but not if only partial and local. See *Sonn v. Magone*,¹ affirming *Maddock v. Magone*.² The cases on this subject are too numerous for citation, but we may refer to a few.³

But unless the subject is clearly embraced by the terms of the law, it cannot be a subject for taxation; for, if so, the Secretary of the Treasury and the Judiciary might lay a tax which it is only competent for Congress to lay.⁴

THE POWER TO BORROW MONEY ON THE CREDIT OF THE UNITED STATES.

(CONST. U. S., ART. I, SEC. 8, CLAUSE 2.)

§ 242. In the ninth article of the Confederation power was given to Congress "to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective States, an account of the sums of money so borrowed or emitted." In the scheme of a Constitution presented by Mr. Pinckney this proposition took this form: "To borrow money and emit bills of credit."⁵ In the draft reported by Mr. Rutledge from the Committee of Detail, it stood thus: "To borrow money and emit bills on the credit of the United States."⁶ When this clause came up Gouverneur Morris moved to strike out "and emit bills on the credit of the United States."⁷

¹ 159 U. S. 417.

² 152 U. S. 364.

³ *Tyng v. Grinnell*, 92 U. S. 487; *Arthur v. Morrison*, 96 id. 108; *Swan v. Arthur*, 103 id. 598; *Newman v. Arthur*, 109 id. 132; *Schmieder v. Barney*, 113 id. 645; *Marvel v. Merritt*, 116 id. 11; *Worthington v. Robbins*, 139 id. 337; *Nix v. Heden*, 149 id. 304; *Magone v. Heller*, 150 id. 70; *Cadwalader v. Zeh*, 151 id. 171; *Saltonstall v. Wiebusch*, 156 id. 601; *Patton v. United States*, 159 id. 500.

⁴ *United States v. Isham*, 17 Wall. 496; *Hartranft v. Wiegmann*, 121 U. S. 609; *American Net & Twine Co. v. Worthington*, 141 id. 468; *Gurr v. Scudds*, 11 Exch. 190.

⁵ *Madison Papers*, 740.

⁶ *Id.* 1232.

⁷ *Id.* 1343.

Mr. Madison asked: "Will it not be sufficient to prohibit the making them a *tender*?" Mr. Morris replied: "The moneyed interest will oppose the plan of government if paper emissions be not prohibited." Mr. Gorham was for striking out the words, and said: "The power as far as it will be necessary or safe is involved in that of borrowing." Mr. Ellsworth thought this was a favorable moment to bar the doors against paper money. Mr. Wilson thought it best to remove the possibility of paper money. Mr. Read thought the words, if not struck out, would be as alarming as the "mark of the beast in Revelation." On the vote for striking out, nine States vote aye, two States no.¹ And a note of Mr. Madison states: "The affirmative vote of Virginia was occasioned by the acquiescence of Mr. Madison, who became satisfied that striking out the words would not disable the government from the use of public notes, as far as they could be safe and proper; and would only cut off the pretext for a paper currency, and particularly for making the bills a tender for either public or private debts."²

§ 243. This debate shows that money may be borrowed by bonds or bills of credit, for each is evidence of borrowing. If a creditor takes a bill of credit at the instance of the government, it is because the government borrows that amount from the creditor. It is a novation of the debt. The great question involved in later discussions has turned, not on the power to emit the bill, but to make it a legal tender in the payment of debts. In the case of *Hepburn v. Griswold*³ it was held unconstitutional to make these bills of credit a legal tender in the payment of prior debts between private parties. A change in the *personnel* of the court caused a contrary decision in *Know v. Lee*⁴ and in later cases. In these cases the power is based in a large degree upon the need of such action during war; but in a late case the Supreme Court sustained the power in cases of

¹ Id. 1343-46.

² Id. 1346.

³ 8 Wall. 612.

⁴ 12 Wall. 457. See later cases,

Dooley v. Smith, 13 id. 604; Railroad Co. v. Johnson, 15 id. 193; Julliard v. Greenman, 110 U. S. 421.

both future and prior debts. In this case the court held that there is an implication of this power because all other nations have exercised it. This ground was so held with strong dissent, and is open to great objection.

The court argued that the power existed in Congress because it was not prohibited, and was prohibited to the States. But if this be so, what becomes of the language of the tenth amendment: "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved," etc.? If prohibited to the States, the States do not hold it as a reserved power. But can it be said that though prohibited to the States, if not prohibited to the United States, it is delegated to them. Can there be an implication of grant of power to the United States because the same power is prohibited to the States? It is further objectionable because the court holds that the Congress has power to provide a currency, and that this power involves the implication of a power to make their notes a legal tender. This assumption is faulty in both branches.

§ 244. Congress has no power to provide a currency, except, as we shall see, in metallic coin, and the power to emit bills was never intended to give the power to make them legal tender. But let us look more particularly to the objections to this extraordinary power.

1st. The whole debate in the convention shows that the express power to emit was denied, lest it should be anything else than a form of borrowing money; and further, with great emphasis, it was denied that the power was implied to make these bills a legal tender.

2d. As to prior debts, the government by making its notes, however depreciated, a legal tender in discharge of these prior debts, confiscates the property of the creditor to the debtor to the extent of the depreciation. And to hold that the Constitution intended that such a law was necessary and proper for the execution of the power to borrow money is contrary to Judge Marshall's canon of construction, so often

¹ *McCulloch v. Maryland*, 4 *Wheat.* 416.

quoted.¹ Is it within the scope of the Constitution, or appropriate, or plainly adapted to that end, to interfere with private contracts in order to the borrowing of money by the government? Is it not prohibited by the fifth amendment, which, while allowing the taking of private property for public use, by implication negatives the power of taking private property for private use at all? Does this consist with the letter and spirit of the Constitution — to confiscate the property of A to B in order to facilitate the borrowing of money by the government? So far from it, this invalidation of private contract, this impairment of the obligation of private contract, not granted to the Federal government, but denied to the States, is at war with the spirit of the Constitution, and for such a power to be inferred is out of the question. It is true that this conclusive objection to the legal-tender feature as to pre-existing debts cannot be urged upon the same grounds as to future contracts. Still the mischief resulting from the inference of such power was in the minds of almost all the members of the convention, which made them sedulous to exclude the idea of the States interfering with private contracts; and this makes the assumption of the power by the Federal government to do so contrary to the spirit of the Constitution.

Despite these decisions, however, it has been decided that any contract, prior or future, which in terms is payable in gold and silver coin, cannot be made solvable by a tender of government bills.¹ These decisions, however, make the solvability of the prior contract, based upon the legal tender of coin, under then existing law by a retrospective law, palpably unjust and unconstitutional. A contract made before the war for money can only be discharged by the payment of gold and silver coin, as the only legal tender. How then could a subsequent law make it solvable otherwise?

Another modification of this decision is that it cannot affect the solvability of taxes or debts due the State, which

¹ *Bronson v. Rodes*, 7 Wall. 229; *Furman v. Nichol*, 8 id. 44; *Trebilcock v. Wilson*, 12 id. 687.

being interpreted means that they cannot assume it to be necessary or proper, in order that the government may borrow money, to compel the State to take for its debts and taxes the depreciated currency of the Federal government.¹

§ 245. It is needless, perhaps, to add that the mischievous results upon the moral question of the integrity of contracts and the inviolability of their obligation between man and man, by the assumption of the power by the government to impair and violate these private contracts for the purpose of aiding its power to borrow money, may be felt in the whole Body-politic, until the Supreme Court shall reverse this current of decision.

Nowhere have these evils been more strongly stated than by Judge Story in his Commentaries on the Constitution, one sentence of which may be quoted: "Laws compelling the receipt of a depreciated and depreciating currency in payment of debts were generally, if not universally, prevalent." He quotes from No. 44 of the *Federalist*, in which Mr. Madison says: "Laws impairing the obligation of contracts are contrary to the first principles of the social compact and every principle of sound legislation." In *Trevett v. Weeden*,² decided in Rhode Island in 1796, the judges held that a law making paper money a legal tender was not only unconstitutional, but against the principles of Magna Charta. These views, so expressed, were obviously in the minds of the members of the convention in the debate on the clause above quoted. And that it should be supposed that men holding those views intended the implication of such a power to invade the sanctity of private obligation, as a necessary and "*bona fide* appropriate" means for the execution of the power to borrow money, is absolutely absurd.

§ 246. It is appropriate to consider in this connection the fifth and sixth clauses of the eighth section of this article and the tenth section of the same article, in these words: "The

¹ Lane Co. v. Oregon, 7 Wall. 71; ² Thayer's Constitutional Cases, Hepburn v. Griswold, 8 id. 613; Col- p. 73.
lector v. Day, 11 id. 113.

Congress shall have power to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures; to provide for the punishment of counterfeiting the securities and current coin of the United States.”¹ “No State shall . . . coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts.”

By the ninth article of the Confederation, Congress had power to coin money, and so had the States. But Congress had the “exclusive right and power of regulating the alloy and value of coin struck by their own authority or by that of the States respectively.” Congress also had the power to borrow money and emit bills of credit. The distinction between coining money and emitting bills of credit was very strongly made everywhere in the Articles of Confederation. There is one expression just quoted which shows what was intended by the word *coin*. They speak of coin being “struck” by their own authority. This shows the radical meaning of the word *coin*. It is derived from the iron seal which is impressed by being struck on the metal. It was Cæsar’s stamp of the “image and superscription” which certified a value; it did not give it. The value is inherent; the stamp merely certifies this value.

It is clear from our whole history under the Confederation, and from the debates in the Federal Convention and the character of the Federal Constitution, that:

(1) The word “coin” cannot apply to paper; it applies to metals.

(2) The Confederation had power to coin money, to borrow money, and to emit bills. The distinction is here drawn between coining money and emitting bills. Therefore neither is included in the other.

(3) The Constitution of the United States, in the clause above quoted, draws the same distinction. Congress has power to borrow money — to emit bills being included; and to coin money. This enforces the same distinction.

¹ Const. U. S., Art. I, sec. 8, clause 5, 6.

(4) An emitted bill is a promise to pay money, but is not money; therefore to emit bills is not to coin money.

(5) The States are forbidden to emit bills or to coin money, or to make anything but gold and silver coin a tender. If to coin money be inclusive of to emit bills, why is the proposition repeated?

(6) Congress has power to provide for punishing the counterfeiting of the securities and ~~current~~ coin of the United States. These securities must either be the bonds or the bills of the government. The powers to punish the counterfeiting of these and of current coin are distinct, and neither is included in the other.

The conclusion is absolute that under the power to coin money Congress cannot emit bills. The power to emit bills is included in the power to borrow money. The coin struck by Congress of gold and silver is "current" by the very terms of the Constitution, and the States can make nothing but coin a legal tender. The power to emit bills is not to make them current, but is a mode of borrowing. If by the Constitution the bills were current coin, then they might be claimed to be constitutionally legal tender, but being a mode of borrowing they are no part of the currency of the country.

§ 247. Taking all these clauses together, the true construction of the Constitution may be thus stated: The power to emit bills by Congress is inferred only as a means of borrowing money. The States are forbidden to emit bills of credit, which means bills intended as a currency.¹ But States may emit bills not intended as currency.²

Congress can coin money; the States cannot. And the gold and silver coin struck by Congress becomes legal tender because the States are forbidden to make anything else legal tender. The denial to the States to make anything but gold and silver coin a legal tender indicates that but for this prohibition the States might have done so. This prohibition to the States and the grant to Congress result in the conclusion that Congress can make current a coin which is legal tender

¹Craig v. Missouri, 4 Pet. 420.

²Coupon Cases, 114 U. S. 269.

in the payment of debts, and against which the States cannot discriminate. If this be so, how can bills emitted under the power to borrow money, and not as currency, be a legal tender for any debt?

Except for the prohibition on the States as to legal tender, it is obvious that the power of Congress to coin money would have left the States free to make something else than coin a legal tender in the payment of debts. But when the Constitution gave to Congress the power to coin, and denied it to the States; and also denied to them the right to make anything but gold and silver coin a tender, it made coin a legal tender, and gave to Congress nowhere the power to make anything but coin a legal tender. It does not grant this power to Congress and prohibit it to the States. And the prohibition on the States against making anything but gold and silver a tender, affirmatively makes gold and silver coin a legal tender. This being so, the inference of power in Congress to change the legal tender established by the Constitution is out of the question, unless we are to presume the grant to Congress of a power because it is prohibited to the States.

The debate on the striking out of the clause "to emit bills of credit" shows the bitter antagonism of the members of the convention to any kind of paper, Federal or State, as a legal tender in the payment of debts. This feeling was as strong against paper issues by Congress as against paper issues by the States; both were regarded as flagrant violations of the rights of citizens in respect to their contracts. It is absurd to hold that this invasion of the integrity of private contracts by making them solvable in the paper issues of the government is any more mischievous or harmful when sanctioned by one government than when done by another. They prohibited it to the States because, unless prohibited, it was reserved to them. They not only did not grant it to Congress, but struck out the words "to emit bills," to exclude the possibility of an inference of such a power in Congress. So that they effected their purpose of protecting private contracts

from violation by the government in this matter of legal tender by prohibiting the power to the States, and not delegating it to Congress.

If, then, the Constitution has made gold and silver coin the only legal tender, and Congress has power to strike these coins, and this power to coin is denied to the States, as well as the power to make any other than these coins a legal tender, it would seem to follow that Congress may coin both metals, and can deny to neither the functions of money. As the States are confined to both as legal tender, Congress must furnish both. Under this power mints have been established under which the coinage of these metals is conducted. The silver dollar weighs $412\frac{1}{2}$ grains, consisting of 371 grains of pure silver and the rest alloy; and the gold dollar weighs 25.8 grains, being 22 of pure gold and the rest alloy. When an ounce of silver is worth \$1.29 the coins are at par. The value of a silver dollar is ascertained by the proportion: market value of one ounce of silver is to 129 as the value of a silver dollar is to 100. Under the power of Congress to regulate the value thereof, that is, of the coined money and of foreign coin, it determines the relative quantity of either metal to be put into a coin of either — a question which at the present time excites great interest; but it would not be proper to consider it here, as it is a question of political economy rather than a question of constitutional power.

§ 248. Another question has arisen under these clauses: Can Congress charter a bank? Clearly so in the District of Columbia, because of the exclusive legislation therein granted to Congress.¹ It has been supposed that this question was settled in *McCulloch v. Maryland*.² That case, however, only decided that the establishment of a bank as a means to exercise the fiscal functions of the government was necessary and proper within the true meaning of those words. The court considered it as a means to conduct fiscal operations, which was a legitimate end, and this was an appropriate means to that end.

¹ Const. U. S., Art. I, sec. 8, clause 17. ² 4 Wheat. 416.

But again the question arises: Can a national bank be incorporated for the purpose of providing a currency for the country? We are met by the further question: Has Congress under this power to coin money the right to provide a paper currency for the country? And that being answered in the negative, as we have shown it should be, the establishment of a bank for that purpose would not be constitutional because the end in view is not legitimate. The court expressly excludes the idea of establishing such an institution for its own sake; and unless for a legitimate constitutional end, it therefore cannot be established at all by Congress. The language of the court is clear upon this point. It says: "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. . . . The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is therefore perceived why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them."

Had it been intended to grant this power as one which would be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means to be employed only for the purpose of carrying into execution the given powers, there could be no motive for mentioning it particularly.

§ 249. Mr. Madison gives an interesting history of the debate on this question, to which reference may be made.¹ He proposed to enlarge the motion of Dr. Franklin, "to provide for cutting canals, where deemed necessary," into

¹ Madison Papers, 1576-77.

a proposition to "grant charters of incorporation where the interests of the United States might require, and the legislative provisions of individual States may be incompetent." He declared that his primary object was to secure easy communication between the States. Mr. King said that in Philadelphia and New York the proposition would be referred "to the establishment of a bank," about which there was great contention. Mr. Wilson disagreed with Mr. King as to the prejudice against banks. The motion was then so modified as to be limited to the case of cutting canals. In that limited form it was rejected — ayes, three States; noes, eight States. It is therefore not settled by the decision in *McCulloch v. Maryland* that Congress has power to establish a bank to furnish a currency or for its own credit purposes; and the debate referred to negatives any such purpose by the members of the convention, but shows that a direct proposition for that purpose in the convention was virtually negatived. In the case of *McCulloch v. Maryland* the court held that the States could create banks of discount and circulation.¹ The decision in that case, therefore, gave a qualified sanction to the power to establish a national bank as a fiscal agent for the government, but conceded the power to the States to establish State banks within their borders. And yet, by a new construction of the terms of the Constitution, Congress has created thousands of banks for their own benefit and not as fiscal agents of the government, and to create a national currency; and has passed a law to tax State banks out of existence and give a monopoly to the national currency.² In the case of *Veazie Bank v. Fenno*, Chief Justice Chase delivered the opinion, which Mr. Justice Miller criticised in the *Legal Tender Cases*.³

¹ 4 Wheat. 416. In accord, *Osborne v. Bank*, 9 Wheat. 804; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Woodruff v. Trapnall*, 10 How. 205; *Darrington v. Bank of Ala-*

bama, 13 id. 12; *Curran v. Arkansas*, 15 id. 304.

² *Veazie Bank v. Fenno*, 8 Wall. 533.

³ *Hepburn v. Griswold*, 8 Wall. 612; *Knox v. Lee*, 12 id. 457.

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